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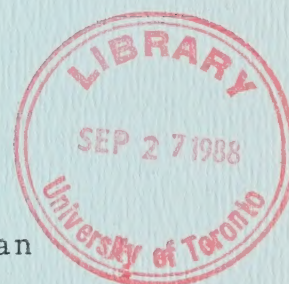
VOLUME: XLVII

DATE: September 15th, 1988

BEFORE: M.I. JEFFERY, Q.C., Chairman

E. MARTEL, Member

A. KOVEN, Member



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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -


IN THE MATTER of an Order-in-Council
(O.C. 2449/87) authorizing the
Environmental Assessment Board to
administer a funding program, in
connection with the environmental
assessment hearing with respect to the
Timber Management Class
Environmental Assessment, and to
distribute funds to qualified
participants.

Hearing held at the Ramada Prince Arthur
Hotel, 17 North Cumberland St., Thunder
Bay, Ontario, on Thursday, September 15th,
1988, commencing at 9:30 a.m.

VOLUME XLVII

BEFORE:

MR. MICHAEL I. JEFFERY, Q.C.	Chairman
MR. ELIE MARTEL	Member
MRS. ANNE KOVEN	Member



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I N D E X O F P R O C E E D I N G S

<u>Witness:</u>	<u>Page No.</u>
<u>JOHN R.E. KENRICK,</u> <u>M. MELVIN CRYSTAL</u> , Resumed	7896
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I N D E X O F E X H I B I T S

<u>Exhibit No.</u>	<u>Description</u>	<u>Page No.</u>
220	Appendix to Consultant's Report	7896
221	One-page document entitled: Treaty Land Resource Promises Questioned were only Partially Fulfilled by Actions of the Ontario Government (Grand Council Treaty No.3)	7936
222	Letter dated July 18, 1988 addressed to Chief Don Jones, signed by Ian Scott.	7936
223	Document titled: Specific Claims in Canada, Status Report December, 1988 with insignia of Government of Canada, Department of Indian and Northern Affairs.	7941
224	Document titled: An Agenda for Action dated August, 1988.	7952
225	Copy of letter dated August 12, 1988 signed by Ian Scott, Attorney General.	8016
226	Photocopy of a document entitled: Rising to the Challenge, publication of the Canadian Wildlife Federation.	8028
227	13-page guideline document dated May 10, 1979.	8045
228	Updated Guidelines.	8051
229	Letter from Office of the Federal Minister of the Environment dated April 11, 1988.	8055
230	Report of the Indian Commission of Ontario.	8059

Index of Exhibits (Cont'd)

<u>Exhibit No.</u>	<u>Description</u>	<u>Page No.</u>
231	Booklet containing Grand Council Treaty No. 3 position.	8062
232	Letter dated May 30, 1988 on letterhead of Indian Commission of Ontario addressed to Grand Chief Robin Green, signed by Roberta Jamieson, Commissioner.	8068

1 ---Upon commencing at 9:35 a.m.

2 THE CHAIRMAN: Thank you, ladies and
3 gentlemen. Please be seated.

4 Mr. Colborne, are you ready?

5 MR. COLBORNE: Yes, I am. Thank you, Mr.
6 Chairman.

7 JOHN E. KENRICK,
8 M. MELVIN CRYSTAL, Resumed

9 MR. COLBORNE: Yesterday I referred Mr.
10 Kenrick to a document which was not filed, the reason
11 being that I did not have sufficient copies because I
12 just received it. I have those now.

13 Q. Mr. Kenrick, is that the appendix to
14 the consultant's report which was your sole source or
15 substantially sole source of data concerning Indian
16 population and Indian employment that I referred to
17 yesterday?

18 MR. KENRICK: A. Yes.

19 THE CHAIRMAN: That will be Exhibit No.
20 220.

21 ---EXHIBIT NO. 220: Appendix to Consultant's Report.

22 MR. COLBORNE: Q. Mr. Crystal?

23 MR. CRYSTAL: A. Yes, sir.

24 MR. FREIDIN: Mr. Chairman, Mr. Colborne
25 doesn't have a copy of that document that I could

1 follow. I wonder if I could use one of the Board's
2 extra copies.

3 THE CHAIRMAN: Sure.

4 MR. COLBORNE: Excuse me, Mr. Chairman.
5 I am not asking any questions about this document. I
6 am simply filing it and I furnished one to the witness,
7 so I thought Mr. Freidin would get that eventually.

8 THE CHAIRMAN: All right. That is fine.

9 MR. COLBORNE: Q. Mr. Crystal, at the
10 beginning of the evidence of this panel Mr. Freidin
11 made some introductory comments and they are, of
12 course, not evidence. I want to refer you to some of
13 them and ask you if you adopt them and agree.

14 MR. CRYSTAL: A. Okay.

15 Q. At page 7192 of the transcript for
16 September 6th--

17 A. Yes.

18 Q. --the first full paragraph at the top
19 of the page:

20 "It is the Ministry's position that this
21 question cannot be answered without a
22 clear definition of what those treaty and
23 aboriginal rights are. It is the
24 Ministry's position that at this time the
25 nature and character of those rights are

1 largely undefined."

2 Do you adopt that?

3 A. I am sorry, I haven't read the whole
4 transcript. What is the question that says it is the
5 Ministry -- that this question cannot be answered.
6 Which question is that?

7 Q. I don't know. It certainly has to do
8 generally with the question of the applicability of
9 treaty rights and perhaps other rights of that kind to
10 what --

11 A. You are saying that the question of
12 treaty rights can't be defined without a clear
13 definition of treaty rights. It doesn't make any sense
14 to me.

15 Q. Well, those are not my words, those
16 are the words of your counsel?

17 A. Well, perhaps if we read in -- if we
18 have a look at page 791 it might shed a little more
19 light on the issue, because it is obviously referring
20 to something that was said earlier in the transcript.

21 Q. You mean page 7191?

22 A. Yes, I am sorry.

23 Q. There I see the word 'question'?

24 A. Where is that?

25 Q. At line 20.

1 "The question which often is posed is:
2 Well, if you are going to be talking .
3 about the environment affected and you
4 are going to be talking about native
5 people, could you tell us how timber
6 management activities have an effect on
7 treaty and aboriginal rights?"

8 A. Yes, I am sure that is the question
9 that Mr. Freidin was referring to in the next page.

10 Q. Now, returning to the original
11 question.

12 A. Yes.

13 Q. Do you adopt, as your evidence, what
14 he said: That this question cannot be answered without
15 a clear definition of what those treaty and aboriginal
16 rights are?

17 A. Well, in one context I do adopt it,
18 in another context I do not.

19 Q. Explain, please?

20 A. In the overall context of that
21 question that's posed, which I think perhaps goes
22 beyond the scope of this hearing, I adopt it. I am not
23 sure that to the extent that that question needs to be
24 answered through the process of this hearing that it
25 must be answered.

1 Q. Do you, in your experience, see
2 progress towards achieving an answer on the assumption
3 that the answer is not clearly defined now?

4 A. I am sorry, I am not sure that I
5 understand your question. Can you repeat it again?

6 Q. In your experience have you seen a
7 direction toward achievement of the clear definition
8 which is referred to in this passage from Mr. Freidin's
9 comments. Is it moving in the direction of settlement?

10 A. I believe that it is.

11 Q. Okay.

12 A. I should qualify that by saying I am
13 not making any comment on the amount of progress that
14 has been made to date, but I think that when I joined
15 the government in 1983, when I compare where we are on
16 native issues at that time to where we are now, I think
17 that one can see a trend and that trend is towards
18 resolution.

19 I think that we have made -- we have
20 moved in the direction of resolution of some of these
21 issues. I don't think we have moved backwards in those
22 four or five years.

23 Q. What's behind that trend, in your
24 opinion? May I suggest to you that court decisions
25 might be a part of it?

1 A. Well, I think that it is fair to say
2 that there is a case decided in, I believe, 1973 that
3 was the Calder case - I think that was 1973 - and I
4 think that in many ways that case can be seen as
5 something of a watershed. Was it 1973 or...

6 So I think that's one case, I believe
7 that has influence.

8 Q. Yes, it was 1973 but, sir, could you
9 restrict your evidence to the time within your own
10 experience since 1983?

11 A. Well, I think that there has been a
12 greater awareness of native issues through -- I think
13 as a result of native people bringing the issue to the
14 forefront to some extent. I think that has been a
15 factor in the advancement towards progress.

16 I think that the constitutional amendment
17 of 1982, while that just precedes my time with the
18 government to some extent, has been a very major
19 factor. In fact, I think that perhaps has been the
20 most significant factor.

21 Q. I suggest to you that court decisions
22 may have something to do with it. Are you, by your
23 answer, telling me that you don't think they have been
24 a large part of the impetus behind the trend that you
25 believe exists?

1 A. Well, I am just trying to go over in
2 my mind what court cases might have had this effect.
3 Perhaps one of the most publicized native rights court
4 cases during that period of time has been the Bear
5 Island case. That is a case in which the Crown was the
6 successful party and yet, nevertheless, that issue is
7 still moving, I think, towards resolution today and I
8 am not sure that it is purely that court decision that
9 has moved things in those directions. I think there
10 are other factors that have moved things in that
11 direction.

12 THE CHAIRMAN: Mr. Crystal, if you are
13 going to refer in your evidence to cases:

14 MR. CRYSTAL: Yes. '

15 THE CHAIRMAN: Of which many people who
16 are reading the transcripts have no knowledge of
17 whatsoever.

18 MR. CRYSTAL: Yes.

19 THE CHAIRMAN: I think it would help if
20 you would just give a very brief synopsis of what the
21 case was about, if the decision on the case is of
22 importance to the point that you are trying to make.

23 MR. CRYSTAL: Well, the Bear Island case
24 is often sometimes known as the Temagami case and I
25 think that's one that has had some publicity in the

1 last little while. And it is essentially a
2 comprehensive land claim by the Temagami Anishnawbe
3 Indian people and it is their claim that they did not
4 participate in the Robinson-Huron treaty-making
5 process, that they were not signatories to the treaty,
6 that they had never surrendered their aboriginal rights
7 to their traditional lands and they brought that claim
8 forward in the Supreme Court of Ontario and at trial
9 the Crown was successful in the decision.

10 I don't know that successful is the right
11 word, but the court found that there was no outstanding
12 aboriginal title in respect of the land. Now that
13 matter going to appeal in the Ontario Court of Appeal
14 will probably be heard in January, but I just raise
15 that case as an example of one where the Crown
16 succeeded and, nevertheless, the matter is still moving
17 toward resolution.

18 So I don't think that litigation is
19 necessarily always a driving force pushing things
20 towards resolution, sometimes it may be.

21 MR. COLBORNE: Q. In the paragraph that
22 I was referring you to, litigation is one of the list
23 of three items being: litigation, constitutional
24 negotiations and negotiations which are then referred
25 to in the latter part of that paragraph.

1 Would you take a quick look at that.

2 MR. CRYSTAL: A. Yes.

3 Q. You have now referred to litigation.
4 Could you now tell me anything about constitutional
5 negotiations which might have anything to do with the
6 trend that you believe is occurring?

7 A. Well, I think that I made reference
8 to the 1982 amendment and I am not sure that that
9 amendment flowed from what we will call formal
10 negotiations like the constitutional conferences which
11 followed after the constitutional amendments in 1982.

12 So I think that those constitutional
13 negotiations which led to the enactment of - and I say
14 those were informal negotiations - but, the discussions
15 which led to the enactment of Section 35(10) have
16 moved, I think, native self-government and native
17 treaty and aboriginal rights a giant step forward
18 through that constitutional amendment.

19 Unfortunately the constitutional
20 discussions which followed from that constitutional
21 amendment in 1982 were not as successful as everyone
22 had hoped they would be. I don't think anyone has
23 ruled out the possibility of further constitutional
24 discussions, although I don't think there are any plans
25 for the immediate future, but I fully expect that there

1 will be and I would think that, you know, that's an
2 expectation that many people have, that there will be
3 further constitutional discussions on the issue. I
4 believe there has to be.

5 Q. Let's just go on. So if I understand
6 you correctly, the constitutional negotiations ought
7 properly to have been referred to in the past tense
8 here because there aren't any currently, but there may
9 well be some in the future; is that right?

10 A. No, I believe that what I said is
11 that there were some in the past and that there will
12 almost certainly be some in the future. There are no
13 immediate plans for any in the immediate future.

14 Q. On what basis do you that see there
15 will almost certainly be some in the future?

16 A. Because -- well, this is just a
17 matter of my own personal opinion, but I think that
18 there is a need for...

19 Q. Actually, sir, you don't have to give
20 me your opinion on that one. What knowledge, what
21 facts do you have that would lead you to hold that
22 opinion?

23 A. Well, I know that the Government of
24 the Ontario has been committed to participating in
25 those negotiations and I think it is the desire for the

1 Government of Ontario for such negotiations to occur.

2 Q. But there are other provinces in
3 Canada that would have to participate?

4 A. Yes.

5 Q. And the federal government?

6 A. Yes.

7 Q. Yes. Now, the third item there,
8 negotiations. If I understand your evidence correctly,
9 you are saying these things ought to be resolved by way
10 of negotiation. Is that -- not what is said there, but
11 what you have said elsewhere in your evidence?

12 A. That's correct.

13 Q. Now, for negotiations to succeed, I
14 am sure you would agree with me that all of the parties
15 must engage in those negotiations in good faith and
16 must enter full bona fides, they must be there to
17 actually negotiate; don't you agree?

18 A. Yes, I do.

19 Q. Do you say that Ontario does that in
20 all cases that involve Indian rights?

21 A. I believe that Ontario has involved
22 itself in all its negotiations with Indian people in
23 good faith, yes, I do.

24 Q. Sir, at the opening Mr. Freidin
25 referred to a difference of opinion between, I am not

1 sure if he was talking about myself and Mr. Hunter or
2 my clients and Mr. Hunter's clients. Do you; from your
3 knowledge and your position, think there is a
4 difference of opinion?

5 A. Difference of opinion between
6 yourself and Mr. Hunter on some issues. I think there
7 probably are some differences of opinion between the
8 two of you on some issues. I would be very surprised
9 if two lawyers didn't have a disagreement on some
10 issues in the approaches taken.

11 Q. Well, look at -- that sir, I suggest
12 to you is simply unresponsive and sarcastic. Please,
13 try to answer the question.

14 A. I will.

15 Q. Because there is a lot of people
16 here. Now, I will refer you to the paragraph and I
17 will read it to you.

18 At page 7193, beginning at line 4:

19 "And you will see, Mr. Chairman, that
20 different positions were taken by those
21 two gentlemen on behalf of their clients
22 and because of that difference of opinion
23 it really, in effect, I would suggest,
24 put the Ministry between a rock and a
25 hard place as to whether these aboriginal

1 and treaty rights would have to be dealt
2 with and, if so, how."

3 A. Mm-hmm.

4 Q. My question to you is: Do you adopt
5 that, do you agree with it?

6 MR. FREIDIN: Perhaps you should indicate
7 to the witness that what I was talking about when I was
8 talking about the difference of opinion was the view
9 of, as I understood your comments and Mr. Hunter's
10 comments, made during the preliminary hearings or
11 during the opening of these hearings as to whether in
12 fact treaty and aboriginal rights were and -- ownership
13 and such matters were to be discussed.

14 That's what I said.

15 MR. COLBORNE: Well, witness do you adopt
16 that?

17 MR. CRYSTAL: A. It is my understanding
18 that Mr. Hunter did not wish to have treaty and
19 aboriginal rights as a subject of this hearing and it
20 is my understanding that you did.

21 Q. And do you consider that a difference
22 of opinion?

23 A. Yes, I do.

24 Q. Do you --

25 THE CHAIRMAN: It is a fairly fundamental

1 one, would you not say, Mr. Colborne? It is a
2 difference of opinion.

3 MR. COLBORNE: Q. Would you agree, Mr.
4 Crystal, that the situation of Mr. Hunter's clients is
5 that their territory has not been occupied by the
6 forest industry, whereas my clients' territory has been
7 occupied by the forest industry.

8 MR. FREIDIN: That's not the same
9 question.

10 MR. COLBORNE: I didn't say it was the
11 same question. It is my next question.

12 THE CHAIRMAN: Well, do we have evidence
13 of that before us at this point, Mr. Colborne?

14 MR. COLBORNE: This is the man who is the
15 expert for this Ministry on Indians and he is appearing
16 for a forest management hearing. Surely it is a proper
17 question.

18 THE CHAIRMAN: Well, I am not saying it
19 is not proper, but what I am saying is: Do we have any
20 evidence before us as to whether or not any of the
21 lands covered by -- covered is not the right word - but
22 covered by Mr. Hunter's clients are impacted or not
23 impacted by this hearing?

24 I am not sure that we have got that kind
25 of information before us at this time.

1 MR. COLBORNE: I think there is. At
2 least two of the witnesses identified the geographical
3 dividing line between the Treaty 9 territory south and
4 certainly several of the witnesses identified the
5 northern extent of the forestry agreements and active
6 forestry and those were identified on maps.

7 I am not absolutely certain that a single
8 witness at a particular time said: And one can see
9 that the act of forestry is not generally taking place
10 yet in the Treaty 9 territory, but one can see that
11 active forestry is obviously taking place in all Treaty
12 3 territory.

13 THE CHAIRMAN: All right. Well, go
14 ahead, Mr. Crystal, if you can answer the questions.

15 MR. CRYSTAL: I am not sure that I can.
16 I can give you my general impression, but I can't
17 answer your question with any precision.

18 MR. COLBORNE: Q. Please, please.

19 MR. CRYSTAL: A. It is my general
20 impression that there is more industrial activity in
21 the Treaty 3 area, that the percentage of the Treaty 3
22 area that has some sort of industrial activity going on
23 on it is greater than the percentage of the area of the
24 NAN area where there is some sort of industrial
25 activity.

1 That's my general impression and I
2 don't -- I have no special expertise upon which I base
3 that, reading the newspapers or whatever.

4 Q. At page 7198 of the transcript,
5 toward the bottom of the page, the passage that I will
6 read to you begins at line 18.

7 Mr. Freidin is referring to the paper
8 which you wrote and which appears in the material for
9 Panel 6 and he says that:

10 "Its contents have been approved by the
11 Ontario Native Affairs Directorate.
12 There will be no question that that
13 particular statement is correct. We will
14 not reconsider that because that, in my
15 submission, is an accurate statement."
16 Do you adopt that?

17 A. Yes, I do.

18 Q. So you drafted that report and what
19 involvement did the Ontario Native Affairs Directorate
20 have in it before it appeared in the evidence
21 materials?

22 A. I drafted that report, I sent it to
23 the Ontario Native Affairs Directorate for comment,
24 they provided comment. I happened to have prepared it
25 on a personal computer which is a portable. I brought

1 that personal computer to their office and several
2 members of the Ontario Native Affairs Directorate sat
3 around the terminal with me while I listened to their
4 comments and amended my paper on the personal computer
5 until there were no more amendments to make. And
6 everyone walked away from the computer saying: Well, I
7 guess that's acceptable now.

8 Q. And that makes it correct?

9 A. Oh. I don't think that the comment
10 that the particularly statement is correct refers to
11 the correctness of the paper itself, but just rather to
12 the fact that the Ontario Native Affairs Directorate
13 approved it.

14 Q. Oh, I see. I was misreading that. I
15 thought Mr. Freidin was trying to say again and
16 again --

17 MR. FREIDIN: There is no use
18 cross-examining him on that. Mr. Crystal has
19 interpreted my comments correctly.

20 MR. COLBORNE: Q. And the next sentence
21 as well:

22 "We will not reconsider that."

23 He is referring not to the contents of
24 your paper...

25 A. Yes, that's my understanding at any

1 rate, that he is just saying that -- the question of
2 whether or not the Ontario Native Affairs Directorate
3 has approved this paper is not a matter that deserves
4 further question because it is beyond question that
5 they have approved it.

6 MR. FREIDIN: That's correct, Mr.
7 Chairman.

8 MR. COLBORNE: Q. And that's how
9 approvals take place within the Government of Ontario,
10 people stand around a personal computer and then once
11 you press the go button on your computer, it has been
12 approved by another office, another ministry?

13 A. Well, quite frankly I think approvals
14 take place in a somewhat less comprehensive sort of
15 way. I was particularly pleased with this method of
16 approval because it really allowed members of that
17 agency, the Ontario Native Affairs Directorate to get
18 into the heart of the paper and to - not just make
19 marginal comments and then leave it to me to either
20 incorporate them as I saw fit or not - the amendments
21 were made before their very eyes and I thought it was a
22 very effective way.

23 Then after that had been done, I guess I
24 should have gone further on, I printed out the paper
25 that had been prepared and submitted it to ONAD for

1 further comment and I am not sure if there were any
2 further comments, but if there were there may have been
3 a few minor amendments made at that time and the
4 understanding was that ONAD had approved the paper.

5 Q. Let me ask you a couple of questions
6 about the paper. First of all, would you agree that
7 the first half of it dealing with legal questions as
8 opposed to policy questions has to do with your view -
9 and 'your' might be taken collectively, I am not
10 suggesting that it is simply a personal view - your
11 view of the basis upon which native people assert an
12 interest in natural resources?

13 A. No, I don't think I would put it that
14 way.

15 Q. Well, let me ask you this question:
16 Why is there absolutely nothing in that paper about the
17 basis upon which the Government of Ontario asserts its
18 ownership of natural resources?

19 A. For that, you mean Section 109 of the
20 Constitution?

21 Q. Yes.

22 A. Well, frankly...

23 Q. If you are going to deal with one
24 side, don't you think it is simply the balancing thing
25 or even a paragraph--

1 A. Perhaps...

2 Q. --to say that by the way here is why
3 they are wrong and we are right?

4 A. Well, I would hate to think that the
5 issue could be trivialized to the point where one could
6 say they are wrong and we are right. I really don't
7 think that this issue was one of which you can say that
8 sort of thing, first of all.

9 When I was preparing the paper and I was
10 considering the material that I would be speaking to
11 the Board about, I had to make certain choices about
12 what -- how I wanted to go as far as detail was
13 concerned and what issues I wanted to raise with the
14 Board. I suppose it was a judgment call.

15 I could have included a discussion of
16 Section 109 and land tenure but, you know, I suppose
17 there are other issues that I may have also raised. I
18 seriously contemplated whether or not I ought to
19 include that material, Section 109, and I just thought
20 that I might be proceeding in a rather complicated area
21 of the law, one that required a great deal of
22 explanation and I chose not to.

23 Perhaps that was a mistake, but I am sure
24 if it was a mistake, you will correct me for that
25 today, Mr. Colborne.

1 Q. Well, sir, I do not propose to give
2 evidence.

3 A. Okay.

4 Q. You might take exception though, I
5 gather, if I did call a witness who assumed that
6 Indians owned the forest and sat and talked about
7 nothing but the defects in your title and presented it
8 it as an attempt to be balanced.

9 A. Well, I think that, you know, there
10 is a certain crucible that is attached to
11 cross-examination. If there is something wrong with a
12 witness' evidence, I think that that will come out in
13 cross-examination. My counsel, I suppose, would be the
14 one to make comment on whether your evidence that you
15 call on your client's behalf is appropriate.

16 I -- certainly it is up to you to call
17 whatever evidence you see fit.

18 Q. Now, could you look at page 170 of
19 the materials which is page 6 of your paper. Towards
20 the bottom of the paper just before the numbered
21 paragraphs appears the introductory words -- I will
22 read the entire paragraph, the introductory paragraph:

23 "This provision has been the subject of
24 considerable judicial interpretation.

25 Ultimately, as a result of cases decided

1 by the Supreme Court of Canada prior to
2 1982 the following interpretation was
3 placed on Section 88."

4 And we have the first point:
5 "Conflicting federal legislation
6 prevails over competing treaty and
7 aboriginal rights."

8 And you quote the George and the Sikyea
9 cases. Are you trying to say there that Sikyea is a
10 Section 88 case?

11 A. Yes.

12 Q. And paragraph 2:
13 "Rights set out in a treaty prevail over
14 pertinent conflicting provincial
15 legislation."

16 And there you quote Sikyea. Are you
17 saying that Sikyea has to do with that issue?

18 A. I believe there are comments made in
19 those decisions which speak to that issue, yes. At
20 least the implication arises from those cases.

21 Q. I really didn't think I would get to
22 this. I have given you a photocopy set of the trial
23 decision, the appeal decision, the Supreme Court
24 decision on Sikyea and I suggest that it hasn't got
25 anything whatever to do with Section 88. The only

1 reference is that at the trial level the section is
2 quoted then dropped as being one that might have
3 something to do with the issue and that the whole case
4 is decided on the basis of parliamentary supremacy. It
5 has nothing to do whatever with Section 88.

6 And, sir, you may be on the stand for a
7 while. I am not inviting you to search through it
8 right now. Perhaps I am wrong, but I was extremely
9 surprised that you characterized it that way in the
10 handfull of cases that you are relying on in an outline
11 paper and I thought you just got it wrong, you put it
12 in the wrong place.

13 So we can get back to that with little
14 breaks and so on. '

15 A. Okay.

16 Q. Now, let me suggest to you what the
17 situation really is. The Sikyea case, without any
18 reference to Section 88, simply said: Parliament under
19 the English system of law is supreme and, therefore,
20 parliament, even though it's abrogating treaty rights,
21 does so, but we can't interfere; that is, the courts.
22 Does that sound perhaps right?

23 A. Yes.

24 Q. And isn't that the case where there
25 was great ringing of hands about how awful it was but

1 that was the law?

2 A. I am not sure about the ringing of
3 hands.

4 Q. Well, check when you read the text.
5 Okay. And it was the George case - that's the one that
6 you quote correctly - it was the George case in which
7 the Indians came forward and say: Well, in Sikyea you
8 told us that parliament could do whatever it wanted
9 even if it was abrogating a treaty, but now we want
10 you, that is the courts, to look at Section 88 and see
11 if it gives us any protection.

12 And it was only in the George case that
13 the courts looked at Section 88 and said: No, sorry,
14 Indians that doesn't give you any protection either
15 except against the provinces.

16 Now, just going on to 171 at the very
17 bottom you have referred...

18 A. If I might just qualify. I think
19 that those cases are cited for the propositions which
20 appear immediately before them and I suppose I will
21 have to review the case, but in No. 2 it may be that
22 Sikyea does not speak to the issue of competing treaty
23 and aboriginal rights with provincial legislation
24 directly since it was federal legislation that was
25 involved.

1 Q. Yes, page 171 please?

2 A. Yes.

3 Q. Towards the bottom you quote
4 Professor Hogg?

5 A. Yes.

6 Q. His text and in fact you have
7 appended it, I think, as an appendix.

8 A. Yes.

9 Q. My question is: Don't you think that
10 on this question it is better to look at the
11 specialists literature than on just a bare outline in a
12 text of that kind?

13 A. I think Professor Hogg is seen to be
14 a leading constitutional expert.

15 Q. No, he is the one who Ontario always
16 quotes in court, but there are quite a long list of
17 other ones that even Ontario Court of the Appeal
18 finally read in the Agawa case; right?

19 A. Yes.

20 Q. And would you agree with me that Hogg
21 is Ontario's favorite writer of summaries on Section
22 35?

23 A. I would say that he is not just
24 Ontario's favorite and not just on Section 35, but he
25 is seen as a pre-eminent constitutional expert on many

1 issues by many people.

2 Q. Yes. And there are others who could
3 be defined in identical words in Canada; is that not
4 correct? There are other constitutional experts in
5 Canada than Professor Hogg?

6 A. Oh, There are, yes.

7 Q. Sir, page 175, the first full
8 paragraph, the second sentence refers to local policies
9 or ways of doing business which are never articulated
10 at executive levels and which would be difficult to
11 enunciate in this paper.

12 A. Yes.

13 Q. My question to you is simply this:
14 Can you give me one or two examples, because I
15 appreciate you are saying that it is hard to put them
16 on paper, perhaps you can give me a couple of examples
17 so I will understand what you are referring to.

18 A. Well, I think that if I could give
19 you those examples I very well might have enumerated
20 them, but I think that on a day-to-day level I am not
21 able to give you examples at this time. But on a
22 day-to-day basis there is business that is conducted
23 between local ministry staff and the native people and
24 that's what I was trying to describe.

25 Q. Do I take it that you are of the view

1 that that relationship between native people and your
2 local officials is generally positive?

3 A. I think yesterday I said that in some
4 cases it is more cooperative than in others. I think
5 Mr. Kenrick as somebody who has been involved on the
6 local level might be better able to provide you with
7 those examples, you know, provide some examples of his
8 experience in dealing with native people on a
9 day-to-day basis, if you care to ask him.

10 Q. Mr. Kenrick, do you have that
11 sentence from Mr. Crystal's paper before you?

12 MR. KENRICK: A. Yes, I do.

13 Q. And you heard my question. Can you
14 give me an example or two so I understand better what
15 is being referred to?

16 A. If I interpret your term policies
17 correctly, I can think of instances in Moosonee where,
18 I guess I would call them small pea policies generated
19 locally, I suppose you can call that bottom up, where
20 if you will, an office policy to increase the
21 proportion of native staffing in the office. At that
22 time, prior to employment equity days, for instance, I
23 don't believe that was a policy across the Ministry.

24 One of the overriding directions, I think
25 I call it policy again in that district, was to

1 increase tourism benefits to natives. I am not aware
2 of a policy that is that specific or at the time was
3 that specific across government. Those are policy
4 initiatives, if you will, guiding principles that
5 office used during that period of time.

6 Q. Mr. Crystal, is that the type of
7 thing you had in mind when you wrote that sentence?

8 MR. CRYSTAL: A. Yes.

9 Q. But at that time you didn't have any
10 particular examples in mind?

11 A. No, particular -- I had no particular
12 examples in mind, no.

13 Q. Sir, could you look at page 176 now.
14 At the bottom paragraph. I had referred Mr. Kenrick to
15 this paragraph and to a very similar paragraph in his
16 report.

17 A. Yes.

18 Q. What is your understanding of what
19 the first part of that paragraph means, the first part
20 being:

21 "In respect of the regulation of wildlife
22 under provincial legislation, MNR takes
23 the position that while the resources of
24 Ontario belong to all of the people of
25 Ontario and will be administered in the

1 best interests of all of the people in
2 Ontario,..."

3 What does that mean to you?

4 A. I think it means that Ontario takes
5 the position that all of the people of Ontario are
6 entitled to share the benefits that have been bestowed
7 upon us in the way of natural resources and that the
8 Ministry of Natural Resources will administer those
9 natural resources in the best interests of all the
10 people of Ontario.

11 Q. Okay. You are talking about Crown
12 resources or are you talking about natural resources
13 generally?

14 A. Natural resources generally.

15 Q. Okay. Now, you remember I asked Mr.
16 Kenrick about what the application of that principle is
17 to me if I own an acre of land in the middle of the
18 forest and he said - if I recall correctly - that there
19 was some provincial laws that would prevent me from
20 doing certain things with my acre of forest, but if I
21 understood it correctly, he said -- or, he agreed with
22 me that MNR does not have the power otherwise to tell
23 me what to do with my acre of forest?

24 A. Well, I understand that the Game and
25 Fish Act has application in the regulation of game and

1 fish, particularly game on privately owned lands, so I
2 think that in that sense there is provincial regulation
3 which does "tell you what to do on your own land."

4 Q. Yes, I agree there are some.

5 We are here talking about --

6 A. Well, I think the Game and Fish Act
7 is an important Act in the regulation of natural
8 resources, it is not trivial.

9 Q. But insofar as forestry is concerned,
10 the product that enters the forest industrial process,
11 if I own land upon which trees grow--

12 A. Yes.

13 Q. --the Ministry does not have -- does
14 not administer my trees to the benefit of all Ontario,
15 generally speaking; is that not correct?

16 A. I think that's correct.

17 Q. Now, the second part of that -- oh,
18 excuse me. Let me go back to your answer of a moment
19 ago when you said "bestowed upon us". Don't you mean
20 bought by the Europeans. You said, "the natural
21 resources that had been bestowed upon"?

22 A. Yes, I was referring to that in a
23 religious sense.

24 Q. Okay. But don't you agree that
25 historically access to these resources was purchased in

1 treaty agreements?

2 A. I am not sure that I would
3 characterize the treaty-making process as a pure
4 transaction of purchase and sale.

5 Q. I wouldn't either.

6 A. And I think you made a comment that
7 we don't disagree on everything and I think that that
8 is perhaps something that we don't disagree on.

9 Q. Okay. Well, let's go on to the
10 second part of that paragraph. I will read it to you
11 and then I want you to focus in on two -- one phrase
12 and one word.

13 "MNR recognizes obligation under Indian
14 treaties and, in allocating such
15 resources, gives primary consideration to
16 Subsistence use by native people."

17 A. Yes.

18 Q. Please, look at primary consideration
19 and tell me: What does that mean? Does that mean you
20 give priority, in the sense that before other users, or
21 just that you think about it first, or you think about
22 it period?

23 A. Well, it certainly means that we
24 think about it. That certainly goes without saying. I
25 think that it also means that in planning resource

1 management a primary consideration is subsistence use
2 by Indian people. And I am just repeating the words
3 that are there, I am afraid I am not being very
4 enlightening.

5 Q. Okay. You referred to planning. Do
6 you agree that until extremely recently you don't find
7 an MNR planning document that referred to giving
8 primary consideration to rights under Indian treaties
9 or any consideration at all. Some of them have been
10 filed.

11 A. When you say extremely recently...

12 Q. I am talking about the last five
13 years.

14 A. I don't know that I am competent to
15 answer that question.

16 Q. Okay. We can look at the exhibits
17 that have been filed. Now, could you look at the word
18 subsistence. First of all, what is your understanding
19 of what that term means in this your paper.

20 A. For food for personal consumption.

21 Q. Can you refer me to any treaty that
22 restricts hunting and fishing rights, for instance, for
23 food and I notice that you have actually attached pages
24 and pages of photocopies of English versions of the
25 various treaties?

1 treaty agreements?

2 A. I am not sure that I would
3 characterize the treaty-making process as a pure
4 transaction of purchase and sale.

5 Q. I wouldn't either.

6 A. And I think you made a comment that
7 we don't disagree on everything and I think that that
8 is perhaps something that we don't disagree on.

9 Q. Okay. Well, let's go on to the
10 second part of that paragraph. I will read it to you
11 and then I want you to focus in on two -- one phrase
12 and one word.

13 "MNR recognizes obligation under Indian
14 treaties and, in allocating such
15 resources, gives primary consideration to
16 sustenance use by native people."

17 A. Yes.

18 Q. Please, look at primary consideration
19 and tell me: What does that mean? Does that mean you
20 give priority, in the sense that before other users, or
21 just that you think about it first, or you think about
22 it period?

23 A. Well, it certainly means that we
24 think about it. That certainly goes without saying. I
25 think that it also means that in planning resource

1 Those are what the treaty documents say.

2 Q. Do I understand you to be saying that
3 it is Ontario's interpretation of those words and
4 whatever other information Ontario uses to come to its
5 conclusion that those rights have to do only with
6 obtaining game and fish and perhaps other things for
7 food only?

8 A. I think that the issue of how treaty
9 rights should be interpreted, whether they should be
10 interpreted to mean for food only or for purposes of a
11 large commercial enterprise is an issue that still
12 needs to be resolved, or anywhere within the spectrum
13 between those two.

14 Q. Page 178, sir, toward the bottom of
15 the page there is a very short one-sentence paragraph:

16 "Any negotiations for the transfer of
17 access to natural resources shall be
18 subject to existing commitments."

19 A. Yes.

20 Q. Expand on that, please, tell me what
21 that means?

22 A. Well, what that means is that it
23 shall -- well, for example, if there is a contractual
24 commitment, and I just use this by way of example,
25 between the Province of Ontario and some third party in

1 respect of access to natural resources, that any
2 negotiation for the transfer of that access to native
3 people would have to accommodate that third party
4 interest.

5 Q. Accommodate or be subject to, those
6 are your words.

7 A. Yes, and I use those words to mean
8 those existing commitments would have to be respected
9 in some manner or other. I don't necessarily mean that
10 those commitments would, in all cases, prevail to their
11 highest magnitude, but I would think that the part
12 where such a situation arose, the parties would have to
13 come together to try to work out some mutually
14 acceptable agreement on the issue.

15 Q. So the phrase 'subject to' should not
16 be read literally, it should be read in a more loose
17 manner perhaps?

18 A. I think I have given my answer.

19 Q. Well, I am going to have to ask you a
20 little more then.

21 A. Okay.

22 Q. If I understood you correctly you
23 were saying that if there were competing interests that
24 those competing claimants would have to be involved in
25 discussions before any settlement of an Indian claim

1 that would affect their interests?

2 A. Well, I think that the Government of
3 Ontario in settling Indian claims would try to settle
4 such a claim in a manner that did not disturb any
5 existing commitments and if a situation arose where it
6 was impossible to settle a claim without disturbing one
7 of those commitments, I think it would probably be
8 necessary to consult very carefully with that person
9 who had been given that commitment by the Government of
10 Ontario, yes.

11 Q. Okay. Is that Ontario consulting,
12 or...

13 A. I think that all the parties to the
14 situation would have to be involved.

15 Q. All the parties. And when you refer
16 to existing commitments, are you referring to legally
17 enforcable property interests, or are you referring to
18 a broader category of commitments?

19 A. I think that it could be very well --
20 could be broader than just the very strictest of legal
21 commitments.

22 Q. Let me use, for example, wild rice
23 harvesting licences. If there was a settlement of the
24 wild rice issue are you saying that that -- it should
25 be subject to any wild rice harvesting licence held

1 prior to the settlement by third parties?

2 A. I think that if a third party had a
3 wild rice harvesting licence and had based his
4 livelihood for many years on wild rice harvesting as an
5 industry, that the Government of Ontario, before
6 entering into a settlement on the wild rice issue,
7 would have concern itself with that holder of the wild
8 rice harvesting licence before it entered into any
9 settlement that might disturb a commitment had been
10 made to that person.

11 I think it would be irresponsible for the
12 Government of Ontario to do otherwise.

13 Q. And surely in this era; that is, the
14 last part of the 20th Century, that goes both ways; it
15 would be irresponsible for the Government of Ontario
16 to, in effect, take away non-Indian economic resources?

17 A. Sorry, I don't understand your
18 question.

19 Q. Well, you are aware that some people
20 say that the Government of Ontario in the bad old days
21 took away the Indian access to natural resources and
22 that's the reason why they have had so many economic
23 and other problems. You are aware that some people say
24 that; are you not?

25 I'm not asking you to agree with it.

1 A. I am aware that you have just said
2 that.

3 Q. You have never seen it anywhere else?

4 A. I am not sure that I ever heard it
5 put in quite those words, no.

6 Q. Well, sir, don't you read the
7 literature?

8 A. I have.

9 Q. You work full time in this field, or
10 are you occupied mostly with business that has nothing
11 to do with --

12 THE CHAIRMAN: Mr. Colborne, you are a
13 quite aware from his curriculum vitae I think what his
14 full-time occupation is.

15 MR. COLBORNE: Q. Let's go on to page
16 179 at the top. I want you to look at the first
17 sentence there because I want to ask you again about
18 one phrase and one word in it.

19 The sentence is:

20 "In general, Ontario remains willing to
21 resolve many of the issues relating to
22 native traditional and sustenance
23 harvesting practices through
24 negotiation."

25 A. Yes.

1 Q. Now, I ask you in another context
2 about sustenance. My question here is: First of all,
3 why the introductory words 'in general', what are the
4 exceptions?

5 A. Well, for example, I do know of some
6 land claims where Ontario has reviewed the matter and
7 has said: Ontario doesn't take the position that there
8 is merit for this land claim and we are not prepared to
9 negotiate that.

10 Q. I see.

11 A. But, in general, Ontario remains
12 willing to resolve many of the issues.

13 Q. Okay.

14 A. There are some specific cases perhaps
15 where Ontario is not so willing.

16 Q. And what about the word 'many', is
17 that put in there for the same reason, to refer to
18 situations where Ontario thinks that the proposition
19 being advanced is not meritorious?

20 A. Either not meritorious or not
21 practical at the present time.

22 Q. Does this have anything to do with
23 cost?

24 A. I know that in the federal government
25 that certainly cost seems to be an issue that comes up

1 on a more regular basis. I personally -- I am not
2 saying that cost would never be a factor, but I can say
3 that I personally have never been involved in an issue
4 where cost was in any way a determining factor of
5 resolution of an issue. I haven't personally been
6 involved. I am not saying that it hasn't happened or
7 that it doesn't happen.

8 Q. Well, could I show you a couple of
9 documents. You may recognize them.

10 A. Yes, okay.

11 Q. I have given you one document, I
12 won't read the long title of it, it says Treaty 3 at
13 the top.

14 A. Yes.

15 Q. And I have given you another document
16 which is a letter dated July 18th, 1988. Sir, are you
17 saying that you were familiar with both of those
18 documents or just one of them?

19 A. I am familiar with the issue.

20 Q. Okay.

21 MR. COLBORNE: I want to refer to these
22 documents and I would, therefore, like to have them
23 marked, Mr. Chairman.

24 THE CHAIRMAN: Exhibit 221.

25 MR. COLBORNE: The first would be a

1 one-page document titled: Treaty Land and Resource
2 promises questioned were only partially fulfilled by
3 actions of the Ontario Government.

4 MR. CRYSTAL: Mr. Colborne, who prepared
5 that document. I'm sorry, I am not really that
6 familiar with this document. It looks familiar to me,
7 but I couldn't say who prepared it.

8 MR. COLBORNE: It was forwarded by my
9 client to the Government of Ontario in February, 1986
10 and authored by Grand Council Treaty No. 3.

11 MR. CRYSTAL: Yes, okay.

12 MR. FREIDIN: What Exhibit number, Mr.
13 Chairman?

14 THE CHAIRMAN: 221.

15 ---EXHIBIT NO. 221: One-page document titled: Treaty
16 Land and Resource promises
17 questioned were only partially
18 fulfilled by actions of the
Ontario Government (Grand Council
Treaty No. 3)

19 MR. COLBORNE: The second document that
20 the witness has and this would be 222, Mr. Chairman,

21 THE CHAIRMAN: Exhibit 222.

22 MR. COLBORNE: Is a letter dated July 18,
23 1988 addressed to Chief Don Jones, et cetera and signed
24 by Ian Scott, Minister responsible for native affairs.

25 ---EXHIBIT NO. 222: Letter dated July 18, 1988

1 addressed to Chief Don Jones,
2 signed by Ian Scott.

3 MR. COLBORNE: Q. Now, Mr. Crystal we
4 don't have to pursue this at great length unless there
5 is some reason that arises. I referred you to these
6 documents and produced them because I understood you to
7 just say that you were not aware of a situation where
8 cost was a factor to Ontario in whether claims and
9 issues involving Indians would be resolved?

10 MR. CRYSTAL: A. I don't think that's
11 exactly what I said. I think that what I said was that
12 I was not personally involved in any set of
13 negotiations where cost was determinative of whether or
14 not the issue ought to be resolved, or words to that
15 effect.

16 Q. Okay. Well, let's just look at this
17 and perhaps you and I can agree just on characterizing
18 this without getting into any of the details of fact
19 concerning a particular set of negotiations.

20 Would you agree that my client invited
21 Ontario roughly three years ago to agree that it would
22 honour the terms of Treaty 3?

23 A. Well --

24 Q. Let me see if I can finish. I will
25 try to phrase this as neutral as I can. And, in

1 response to Ontario's request, provided a list so that
2 Ontario could understand exactly what it is that Treaty
3 3 wanted honored and that is the first in the exhibits
4 just filed?

5 A. Yes.

6 Q. And then that Ontario's reply was
7 first we have to internally assess how much it would
8 cost us to do so before we reply and that is what is
9 exhibited in Mr. Scott's letter?

10 A. Yes.

11 Q. You might express it differently, but
12 would you express it radically differently than I have
13 just done?

14 A. No, I wouldn't.

15 Q. Thank you. Could you look, sir, at
16 the bottom of page 179. I want to read to you the last
17 sentence on that page.

18 "MNR and the Province of Ontario are
19 committed to effect consultation with
20 Indian bands concerning resource
21 development on land adjacent to Indian
22 reserves where such development has the
23 potential for significant impact on the
24 band."

25 My question is quite simple, sir: Why

1 the qualifier, why the second half of that sentence,
2 "...where such development has the potential for
3 significant impact on the band"? One would think that
4 that type of thing would be self-evident, so why was it
5 added expressly?

6 A. Well, I think that would be the most
7 important situation to ensure careful consultation with
8 the band.

9 Q. Who decides whether a development has
10 potential for significant impact?

11 A. I think that in many or most cases it
12 is apparent to the Ministry of Natural Resources. In
13 those cases - and I have been involved in some where
14 perhaps it hasn't been apparent - and in those cases,
15 some cases the Indian band has advised that this
16 development taking place near an Indian reserve could
17 have potential significant impact on the band and the
18 Ministry would enter into discussions with the band.

19 Q. At the top of page 180 you say that:
20 "In respect of land claims, Ontario has
21 participated and will continue to
22 participate in efforts to settle land
23 claims."

24 My question, sir, is: Can you give me
25 examples of land claims that have been settled and

1 which Ontario has been involved with?

2 A. Settled to date. I think that there
3 are some matters which are close to settlement but, you
4 know, to be quite candid with you, to date, I am not
5 aware of any Indian land claims where matters have been
6 settled at least to the satisfaction of all parties.

7 I can think of some Indian land claims
8 where the matter has been completed from Ontario's
9 perspective in that its participation has been
10 completed, but that would not be necessarily to the
11 satisfaction of the First Nation involved. I could
12 give you an example of such a situation.

13 But if you are asking me for a land claim
14 settlement where all the parties have mutually agreed
15 to the settlement, I can give you some examples where I
16 think we are close to settlement, but I cannot give you
17 an example of one which has actually been settled.

18 Q. Let me show you a document. Are you
19 familiar with that?

20 A. No, I don't believe I have seen this.
21 At least I haven't reviewed it recently.

22 MR. COLBORNE: I have shown the witness a
23 document printed with the insignia of the Government of
24 the Canada, the Department of Indian and Northern
25 Affairs titled: Specific Claims in Canada, Status

1 Report December, 1985.

2 Mr. Chairman, I would like to file it
3 subject to further identification since this witness, I
4 don't think he said he was certain of it.

5 THE CHAIRMAN: Very well. Subject to
6 further identification, Exhibit 223.

7 ---EXHIBIT NO. 223: Document titled: Specific Claims
8 in Canada, Status Report December,
9 1988 with insignia of Government
of Canada, Department of Indian
and Northern Affairs.

10 MR. COLBORNE: Q. Now, that you have had
11 a chance to look at it a little longer, do you recall
12 seeing this?

13 MR. CRYSTAL: A. No, I don't believe
14 that I have ever seen this document. I should advise
15 you that up until February of this year the Office of
16 Indian Resource Policy was the agency in Ontario
17 responsible for addressing Indian land claims. I am
18 just saying this as a preliminary comment.

19 I am quite open to trying to answer
20 whatever questions you may have. Subsequently, that
21 responsibility devolved to the Ontario Native Affairs
22 Directorate. When I carried on the position of Special
23 Negotiator of Native Issues I was responsible for some
24 land claims and I think I advised you yesterday that I
25 continue to be responsible for some land claims.

1 Now, I have had -- I am familiar with
2 many land claims that Ontario is involved in more
3 because of my work as counsel with the Legal Services
4 Branch when I gave legal advice to the Office of Indian
5 Resource Policy. That is where -- when we talk about a
6 large number of land claims, my knowledge of most of
7 those land claims is derived from that experience and
8 that experience has not occurred for a few years now.

9 So you may find, if it is your plan to
10 ask me questions about the various land claims that are
11 contained in this document, I will be able to provide
12 you a lot of information on some, a little information
13 on others, and no information on some.

14 Q. That wasn't my plan, Mr. Crystal.

15 A. Oh, I just thought...

16 Q. I asked you if any had been settled
17 and I won't try to paraphrase your answer.

18 A. Yes.

19 Q. I wanted to refer you to this
20 document because I assumed, obviously incorrectly, that
21 this would be a document that you would be familiar
22 with and so, therefore, I simply want to direct your
23 attention to two of the claims referred to here?

24 A. Yes.

25 Q. One: Long Lac No. 58 Settlement

1 Reached, says this document which is--

2 A. Yes.

3 Q. --which is not page -- do you know if
4 Ontario had anything to to?

5 A. I don't believe that Ontario
6 participated in the settlement of that -- of the
7 settlement that is being referred to there. I believe
8 that that was an agreement between Canada and the First
9 Nation.

10 Q. Thank you. I said that this document
11 was not paged, I was wrong, I have just referred to
12 page 7.

13 A. Yes.

14 Q. Page 8, there is something called
15 Osnaburg, Settlement Reached, band paid \$16,000 by
16 Ontario in December, 1975. Do you have knowledge of
17 that claim?

18 A. No, I am sorry, I don't.

19 Q. Okay. Now, you don't have time to
20 read the whole list as we sit here, but having heard my
21 questions and given the answers that you have
22 concerning that document, do you have anything further
23 to add to my original question being: Are you aware of
24 any that have been settled in Ontario?

25 A. Well, I think I gave you the answer

1 to that question.

.2 Q. I asked you if you had anything to
3 add after having been referred to this document and if
4 your answer is no, that's fine.

5 A. I think that I added to my answer
6 that there are a number of land claims where there are
7 active negotiations going on and it is hoped that
8 settlement will be reached in the near future. That's
9 what I added on.

10 Q. The next paragraph on page 180 refers
11 to Ontario's willingness to provide--

12 A. I am sorry?

13 Q. Refers to Ontario's willingness to
14 provide land for certain purposes.

15 A. This is in the third full paragraph?

16 Q. No, the second paragraph on page 180.

17 A. Yes.

18 Q. My only question to you there is:
19 Why only in the Territory of the Nishnawbe-Aski Nation?

20 A. I think that that was a policy that
21 was reached in the context of discussions with the
22 Nishnawbe-Aski Nation.

23 Q. And do I take it you are saying that
24 there is no policy with respect to other territory?

25 A. I am not sure that I have seen

1 explicit policy, but I would think that Ontario would
2 be equally willing to provide lands if similar needs
3 were shown to exist.

4 Q. And when you say in that paragraph:
5 "In conjunction with the federal government..."

6 A. Yes.

7 Q. Are you referring there to the
8 federal government directive which is Document 12
9 beginning at page 285 of your report?

10 A. I am sorry, could you ask me that
11 question again.

12 Q. In the paragraph on page 180 of your
13 evidence you refer to Ontario's willingness to provide
14 land and the words I am interested in are "In
15 conjunction with the federal government."

16 A. Yes.

17 Q. The question is: Does that refer us
18 to this federal government directive that you have
19 included with your materials and which begins at page
20 285?

21 A. Well, it is the same federal
22 government, it's the Government of Canada in both
23 cases.

24 Q. No, sir...

25 A. It was not a direct -- it was not an

1 instruction to refer to that other document, but I
2 think that other document is relevant.

3 Q. Well, why don't you just tell me why
4 you put that document in your evidence as an appendix?

5 A. Because I thought it was relevant and
6 I still think it is relevant.

7 Q. Well, it is relevant to what part of
8 your paper; to this paragraph or to some other
9 paragraph, or both, or what?

10 A. I think it is relevant to this
11 paragraph, very relevant to this paragraph. I think it
12 is more directly pertinent to the last paragraph on
13 that page though.

14 Q. And are you referring to the
15 following sentence in that last paragraph -- well, no,
16 I will withdraw that.

17 Having looked at the paragraph perhaps
18 you would agree with me that that entire paragraph has
19 to do with the document we are referring to?

20 A. Yes, that's what I said earlier.

21 Q. What does the following sentence
22 mean:

23 "The establishment of new Indian reserves
24 in Ontario without the participation of
25 the federal government is problematic."

1 A. Yes. What does that mean?

2 Q. Yes.

3 A. Well, under your constitutional
4 arrangement and the division of powers it is the
5 federal government that has responsibility for lands
6 reserved for the Indian and, as such, it is federal --
7 it is within the exclusive federal power to create
8 Indian reserves.

9 And so while Ontario remains willing to
10 provide land in some circumstances, the fact that the
11 federal government is unwilling to participate in the
12 process except in those two exceptional cases, the
13 process is fraught with problems.

14 Now, we are involved in some discussions
15 to try to overcome those problems, but they are serious
16 ones.

17 Q. And what are those serious problems?

18 A. I think it is very difficult for
19 Ontario to establish Indian reserves when it doesn't
20 have the legislative authority to do so.

21 Q. Oh, I quite agree.

22 A. That's the problem.

23 Q. That's the problem, okay. I thought
24 that you may have been referring to the actual content
25 of your Exhibit 12 as creating a problem; am I wrong?

1 A. Well, I think that that Exhibit 12
2 speaks to the problem that I just described.

3 Q. Well, I think we will be returning to
4 this a little later.

5 MR. MARTEL: Excuse me, could I ask a
6 question just to try and get an understanding.

7 Paragraph 2 says:

8 "To meet community needs including
9 economic needs..."

10 And then you go down to paragraph 3, it
11 says:

12 "Four square miles is to be used as a
13 guideline as the extent of Ontario land
14 to be transferred to Canada for Indian
15 reserves."

16 Could I ask a question - hypothetical
17 maybe - but what if the necessity was to go beyond four
18 miles to establish a reserve which made it possible for
19 native people to really make a decent standard of
20 living for themselves, what would be the position of
21 the Ontario government in that case, because here it is
22 limited to four square miles.

23 MR. CRYSTAL: Well, Mr. Martel, it says
24 four square miles is to be used as a guideline. So if
25 there was an apparent requirement for an area of land

1 greater than that, that would certainly be taken into
2 consideration.

3 MR. COLBORNE: Q. Those four square
4 miles or whatever, you get paid for, Ontario gets paid
5 fair market value?

6 A. That was the proposal, yes.

7 Q. So your willingness to provide land
8 is merely a willingness to sell it?

9 A. To the federal government, yes.

10 Q. Yes.

11 A. That's the policy that's set out
12 here. It says:

13 "Land will be transferred to Canada at
14 fair market value or on an acre per acre
15 exchange for existing Indian reserve
16 land."

17 That's correct, yes.

18 Q. Now, sir, I am showing you a document
19 entitled: Aboriginal Rights in Canada and Agenda for
20 Action, the Canadian Bar Association Committee Report.
21 Are you familiar with that?

22 A. No.

23 Q. Are you a member of the Canadian Bar
24 Association?

25 A. No, I am not.

1 MR. COLBORNE: Mr. Chairman, I am asking
2 you to exercise your discretion in favour of permitting
3 me to file this. I assure you it is what it purports
4 to be. I want to ask this witness if he agrees with
5 some of these current statements on the subjects that
6 he has given evidence about.

7 THE CHAIRMAN: Any objections, Mr.
8 Freidin?

9 MR. FREIDIN: Well, I am just wondering
10 whether he can put the statements to the witness and
11 then ask the witness whether he would agree with them.

12 I have some concern about filing the
13 text. I have no idea how that text may be referred to
14 in argument, having it submitted. I am wondering
15 whether the Board would consider having Mr. Colborne
16 deal with it this way?

17 THE CHAIRMAN: Well, are you objecting to
18 the fact that it is not a recognized text in the area,
19 or what exactly is the basis of your objection, in
20 terms of the fact that it is a publication by an
21 apparently reputable authority and the fact that the
22 particular witness is not familiar with the publication
23 itself, why should that prevent it from coming in as
24 opposed to just excerpts.

25 MR. FREIDIN: Well, I haven't seen the

1 text and it's called an Agenda for Action and if it
2 contains opinions of the Canadian Bar Association, of
3 some groups as to what action should be taken in this
4 particular area...

5 THE CHAIRMAN: But why would it be
6 considered more than just that. It is the opinion of a
7 group connected in some fashion with the Canadian Bar
8 Association that wishes to put forward their views on a
9 particular subject to which Mr. Colborne is going to
10 direct specific questions.

11 MR. FREIDIN: Well perhaps, Mr. Chairman,
12 my concern is primarily with the weight that the Board
13 may give it and I suppose I can reserve my comments as
14 to the weight the Board should give it.

15 THE CHAIRMAN: Well, you can certainly
16 address the weight in argument.

17 MR. FREIDIN: Well, all right.

18 THE CHAIRMAN: What I am getting at, it
19 is like any other piece of evidence, Mr. Freidin. The
20 Board will weigh it accordingly. I think it serves no
21 purpose to rule it inadmissible except in terms of
22 specific questions put to the witness. Why not let it
23 in --

24 MR. FREIDIN: With that understanding,
25 Mr. Chairman, I have no objection.

1 THE CHAIRMAN: Very well. Go ahead.

2 MR. COLBORNE: (handed)

3 THE CHAIRMAN: Thank you. Exhibit 224.

4 ---EXHIBIT NO. 224: Document titled: An Agenda for
5 Action dated August, 1988.

6 MR. COLBORNE: Q. Mr. Crystal you will
7 notice it is dated --

8 MR. FREIDIN: Can I have a copy, please?

9 MR. CASSIDY: Can I have a copy, please?

10 MR. COLBORNE: I don't have enough
11 copies.

12 THE CHAIRMAN: Well, does somebody want
13 to use one of our copies up here for the time being.
14 Mr. Campbell, do you want to borrow one of our copies?

15 MR. CAMPBELL: It is all right, I will
16 try and follow it.

17 MR. CASSIDY: If I can, I would like to
18 borrow one for the purposes of following.

19 THE CHAIRMAN: Very well, Mr. Cassidy.
20 Would you mind just returning that after we are through
21 with it.

22 MR. CASSIDY: Certainly.

23 THE CHAIRMAN: Thank you.

24 MR. COLBORNE: Q. Now, you will notice,
25 sir, that it is dated August, 1988.

1 MR. CRYSTAL: A. Yes. I recall
2 newspaper articles about the report. I think it got
3 was some coverage in the Toronto press when it was
4 released.

5 Q. As I said, I wanted to refer you to
6 certain passages and ask you if agree or disagree with
7 them.

8 A. Yes.

9 Q. Could we begin on page 3, there is a
10 heading: Government Policies as to Treaties and
11 immediately below that heading the following statement:

12 The government's view of treaties is that
13 they were "surrenders" of title to the
14 Crown on a grand scale which had the
15 effect of perfecting the Crown's title to
16 vast tracts by extinguishing the Indians'
17 interest."

18 A. I am sorry. Are you asking me a
19 question?

20 Q. Yes.

21 A. Do I agree or disagree with that
22 statement?

23 Q. Do you agree or disagree with that
24 statement?

25 A. I think that it may have been the

1 government's view that that was the case at some time,
2 but I think to the present day that that is an over
3 simplification.

4 Q. A little lower on that page, the
5 first sentence in the last paragraph, I would like to
6 read it to you:

7 "Unable to get successive governments to
8 deal with them in what they perceive to
9 be the true spirit and intent of the
10 treaty conferences. Treaty Indians have
11 been become cynical and bitter."

12 In your experience, do you think that's a
13 true statement?

14 A. Yes.

15 Q. On page 5, sir. Oh, excuse me, I
16 will go forward from page 5 to page 9, under the
17 heading: Prejudicial legislation and the sub-heading:
18 The Right to Vote it states that:

19 "It was not until 1969 that universal
20 suffrage was extended across Canada to
21 unenfranchised Indians in both federal
22 and provincial elections."

23 Do you agree that that is a historical
24 fact?

25 A. To my own -- I know there was a time

1 when there was not universal suffrage for Indian
2 people and I know that there is now. I am not sure of
3 the date from my own personal experience, but I have no
4 reason to dispute it.

5 Q. Thank you. The next page, page 10,
6 under the heading: The Right to Pursue Claims, the
7 following statement appears:

8 "Like anyone else, aboriginal people
9 need legal assistance when they assert
10 claims. From 1921 until 1951 they were,
11 for practical purposes, unable to obtain
12 such assistance. During those years the
13 Indian Act contained the follow
14 provision."

15 And then it quotes a provision which this
16 paper says appeared in the Indian Act until the year
17 1951. Do you agree?

18 It basically made it an offense for
19 lawyers to take money from Indians to represent them.

20 A. I have to admit that I really don't
21 have knowledge of that situation, but again I think
22 this is a reputable, you know, the Canadian Bar
23 Association is a reputable organization, I am sure it
24 is a reputable publication.

25 I don't have any personal knowledge of

1 it. I assume that it is true.

2 Q. Sir, do you agree that a case by the
3 name St. Catharines Milling and Lumber Company Limited
4 is the original one which examined the question of
5 whether, at least in the Treaty 3 area, it was Canada,
6 Ontario, or the Indians who owned the land following
7 the treaty. Let me qualify that, the first one that
8 reached the higher levels of court?

9 A. I am not sure of the second question.
10 I am not sure if I am to answer your first question
11 alone or your second question, or both of them
12 together.

13 I am sorry, I am not trying to be
14 difficult, I just -- the St. Catharines Milling case I
15 believe was the first case to make it to the Judicial
16 Board of the Privy Counsel on the issue of the tenure
17 of Indian land in Ontario and, in particular, in the
18 Treaty 3 area.

19 Q. But, sir, isn't that also the case
20 which, by interpreting the British North America Act,
21 established that it was Ontario and not Canada that had
22 jurisdiction over forestry?

23 A. Well --

24 Q. Isn't that what the case was about?

25 A. Well, I know that there is a passage

1 in the case that makes that comment. I am not sure
2 that that's the -- I don't that I would call that the
3 ration of the case, but I know that there is - if I can
4 just quote a passage from the case - it says:

5 "The treaty leaves the Indians no right
6 whatever to the timber growing upon the
7 lands which they gave up which is now
8 fully vested in the Crown. All revenues
9 derivable from the sale of such portions
10 of it as are situate within the
11 boundaries of Ontario being the property
12 of the province."

13 And I guess that answers your question,
14 it does say that.

15 Q. No, sir, my question to you was: Do
16 you not agree that this case was the one that decided
17 whether Canada or Ontario had ownership of the forest
18 resource and that's what the case was about because
19 Canada issued a licence?

20 A. If I was going to, you know, provide
21 a law school brief of the case I don't know that I
22 would present the ratio in quite those words. Those
23 are your words, they are not your words.

24 Q. Well, I am afraid, sir, that I am
25 going to have to come back here after lunch and bring

1 you a photocopy of that at all levels too, and I am
2 astonished that I have to do that.

3 A. Well, I have a copy of the Judicial
4 Privy Counsel before me, so it is not necessary for you
5 to bring that back and I recently reviewed it, so...

6 Q. I thought that a case which is
7 considered to be the basic case on these questions
8 would be one in which we would have some agreement
9 about the ratio. The ratio of that case, sir, has to
10 do with whether Canada or Ontario have ownership of the
11 forest resource?

12 A. Well, I would have put the ratio of
13 the case more in terms of who is entitled to the -- who
14 has the proprietary interest as opposed to the
15 legislative authority as between Ontario and Canada in
16 the land. I didn't read the case to be -- most of the
17 body of the case to be speaking to the timber industry.
18 That's...

19 Q. Sir, I am not questioning--

20 A. No, Mr. Colborne, you and I --

21 Q. --the Ministry's association with the
22 timber industry. I know that's a great concern, but I
23 am not talking about that.

24 I am talking about whether Canada or
25 Ontario had the constitutional power to legislate and

1 grant land that had to do with forestry?

2 A. Well, I think that what the case is
3 all about was a competition -- a competition between
4 the federal head of power to make laws in respect of
5 Indians and lands reserved for the Indians under
6 Section 91(24) of the Constitution and provincial
7 proprietary interest; that is, derived from Section 109
8 of the Constitution and I think what the case is about
9 is whether or not that Section 91(24) head of power
10 ought to derogate from the Section 109 proprietary
11 interest.

12 That's what I would say the case is all.
13 I am not particularly disagreeing with what you are
14 saying, but that is what I would say the case is about.

15 THE CHAIRMAN: All right. Mr. Colborne,
16 it is ten after eleven. I think it is time, if this is
17 convenient, for a mid-morning break and perhaps if you
18 want question Mr. Crystal specifically with regard to
19 this case after the break, you can do so at that time.

20 MR. COLBORNE: That's a big if, Mr.
21 Chairman.

22 THE CHAIRMAN: Very well. We will break
23 for 20 minutes.

24 Thank you.

25 ---Recess taken at 11:10 a.m.

1 ---Upon resuming at 11:30 a.m.

2 THE CHAIRMAN: Thank you, ladies and
3 gentlemen. Please be seated.

4 Mr. Colborne, just before you begin. It
5 is the Board's intention to break at 12:30 for lunch
6 for an hour and a half.

7 We need the time at lunch time to go over
8 some matters concerning the procedural rulings that we
9 are going to issue in draft form later today, so I just
10 wanted to advise you in advance so that you could
11 structure your examination around that.

12 MR. COLBORNE: Thank you.

13 THE CHAIRMAN: Thank you.

14 MR. COLBORNE: Q. Mr. Crystal, I am
15 electing not to further pursue what you or I may think
16 of that particular case, possibly to the great relief
17 of the panel.

18 I want to ask you, though, if you agree
19 with what the Canadian Bar Association Committee says
20 about that case?

21 MR. CRYSTAL: A. Just let me get my copy
22 of that.

23 Q. That would be beginning at the bottom
24 of page 10.

25 A. You mean that "one astonishing

1 example"?

2 Q. Yes, I will read that passage.

3 "One astonishing example is the land mark
4 case of St. Catharines Milling and Lumber
5 Company Limited and the Queen. Here was
6 a case involving the land rights of
7 Indian people yet they were not parties
8 to the litigation and, accordingly, were
9 not represented. Further, the decision
10 was arrived at in a total vacuum. No
11 evidence was led by any party as to the
12 ways in which the Ojibway had in fact
13 used the land or as to the purposes to
14 which they were put over the hundreds of
15 years in which they had occupied them."
16 Do you agree with that as a matter of
17 fact?

18 A. With the exception of the case, "the
19 decision was arrived at in a total vacuum", I think
20 that sentence is neither here nor there.

21 Q. Well, no, this question of fact. Do
22 you know what evidence was presented to the court in
23 that case, have you studied that as a historian would
24 study that question?

25 A. No, I have not, but I have read the

1 decisions and I would just infer from the decisions
2 that certain constitutional matters were presented to
3 the Judicial Board and the Privy Counsel.

4 So in that sense to say it was arrived at
5 in a total vacuum. If those words were qualified by a
6 total vacuum concerning native rights or something
7 along those lines, then I would agree with it in total.

8 But as it stands, I would take away the
9 sentence, "the decision was arrived at in a total
10 vacuum". If you are agreeing that there was -- if you
11 are asking about whether or not the Indian peoples were
12 parties to the litigation, it is my understanding that
13 they were not.

14 Q. No, I am asking about whether any
15 evidence was led by any party as to the ways in which
16 the Ojibway had in fact used their lands?

17 A. It is my understanding that such
18 evidence was not led.

19 Q. Or to the purposes to which they were
20 put over the hundreds of years in which they had
21 occupied them.

22 A. Yes.

23 Q. Now, there is another reference to
24 the case which appears at page 60. If you can turn
25 forward to that page, please, sir.

1 I would like to read you part of the last
2 full paragraph on that page:

3 "It was not until a dispute arose between
4 the federal government and the Province
5 of Ontario over who owned and could
6 manage lands surrendered under Treaty 3
7 that Indian title litigated. Even then
8 the context should be clearly
9 appreciated. The Ojibway were not a
10 party to the court case nor even
11 bystanders. They were completely ignored
12 in the dispute between the two levels of
13 government over which would benefit from
14 the riches of the land or the lumber
15 company caught in the middle concerned
16 with the validity of its timber licence.
17 In addition, the troops were leaving
18 Toronto to crush the Riel Rebellion the
19 very week that St. Catharines went to
20 trial in Ontario before Chancellor
21 Boyd."

22 Do you agree with the statements of fact
23 that appear in that passage?

24 A. Well, I have learned from this
25 paragraph, something in the last sentence, I wasn't

1 aware that that was the case, but again, I don't doubt
2 that it is true. I just recently reviewed that case
3 for the counsel decision and I would have to review the
4 case again to determine whether it uses the word
5 ownership.

6 I can't recall that it uses that word,
7 but it very well may. But certainly it does speak to
8 the issue of could manage the land, it may also use the
9 word owned, but I don't recall that. Certainly the
10 general spirit of -- the general content of what's set
11 out in that paragraph I would agree with.

12 Q. If you would look at the first
13 paragraph on page 17, the last sentence, I will read
14 you most of that sentence:

15 "Canadian law became fixed in late
16 Victorian judicial attitudes reflecting
17 a vision of Indian people as broken and
18 ultimately doomed to disappear unless
19 protected and preserved on small tracts
20 of land under the control of civil
21 servants and the supervision of the
22 clergy."

23 Do you agree that Canadian law did become
24 fixed with that Victorian judicial attitude?

25 A. Well, that's a very valuated

1 statement and it also talks about attitudes which are
2 somewhat difficult to calibrate. The part about,
3 "reflecting the vision of Indian people as broken and
4 ultimately doomed to disappear", I am really not
5 competent to say whether or not that was part of the
6 judicial attitude of fully Victorian era. It may have
7 been. I am not really competent to -- I am not a
8 student of that, you know, the general -- I am
9 certainly familiar with the number of cases that arose,
10 you know. The case we have been talking about, and the
11 Seabold case and some other cases, but I really don't
12 feel qualified to agree or disagree with that.

13 Q. Have you read anything about what
14 professional modern historians say about these cases,
15 historical analysis as opposed to a purely legal
16 reading of the cases itself?

17 A. I have, but not in preparation for
18 this hearing.

19 Q. Do you believe that those
20 professional historians who have examined not just the
21 cases but the context in which they were decided, the
22 individuals who decided them, the activities of
23 government which were being carried on at the time they
24 were decided and so on, do you believe that those
25 professional historians in general would agree with the

1 sentence that I just read to you?

2 A. Well, some may and some may not. I
3 don't doubt that some would.

4 Q. Let's go on to page 19. This is yet
5 another reference to the St. Catharines Milling case
6 and I think the last one to which I will refer you.

7 In the second paragraph on page 19
8 appears the following sentence:

9 "Recent decisions have declared the
10 earlier jurisprudential assessment by the
11 Privy Counsel..."

12 A. I am sorry, Mr. Colborne, what page?

13 Q. Page 19.

14 A. Page 19, I am sorry. Okay, yes.

15 Q. Second paragraph, the last sentence.

16 A. Yes.

17 Q. "Recent decisions have declared the
18 earlier jurisprudential assessment by the
19 Privy Counsel in the St. Catharines
20 Willing case to be insufficient and
21 inaccurate, yet a detailed alternative
22 has not been forthcoming."

23 Would you agree with that?

24 A. It is my recollection that perhaps
25 the Gerron case in the Supreme Court of Canada decision

1 made some comment like that.

2 Again, I would have to answer with
3 certainty that there are cases that make comments on
4 that. I would have to review some of the cases in my
5 office, but it is my general recollection that there
6 may be a comment like that in some recent
7 jurisprudence.

8 Q. Let me just ask you this: Do you
9 agree that the St. Catharines Milling case was decided
10 in the Victorian era; in other words, in the time when
11 Queen Victoria reigned in England?

12 A. I am not sure of the exact years of
13 Queen Victoria's reign. I think it may have been
14 decided in the Edwardian era. I'm not sure.

15 THE CHAIRMAN: Is that a hundred per cent
16 relevant to what we are deciding?

17 MR. COLBORNE: Well, I asked about a
18 passage referring to Victorian judicial attitudes and
19 I wasn't sure if I had connected that up with case we
20 were talking about. That was the purpose of the
21 question.

22 MR. CRYSTAL: The case is decided in 1888,
23 I believe, is when it was heard at the Judicial Board
24 of the Privy Counsel and I am not sure of the years of
25 Queen Victoria's reign.

1 Yes, it would have been, it would have
2 been. It would have been during her reign.

3 MR. COLBORNE: Q. I ask you now, sir, to
4 look at page 18.

5 A. Yes.

6 Q. Partway through the last paragraph on
7 that page appears the following sentence:

8 "The rights are an interest other than
9 that of the province within the meaning
10 of Section 109 of the Constitution Act."

11 And I believe that here we are talking
12 about aboriginal rights in Canadian law. Do you agree
13 with that statement?

14 MR. CRYSTAL: A. I think that you have
15 to read the full paragraph to...

16 Q. Okay. I won't take up the time to
17 actually read into the record the full paragraph
18 because the document is filed, but please go ahead and
19 read the paragraph to frame your answer, sir, but my
20 question remains: Do you agree with that short passage
21 that I read?

22 A. I frankly have some problem with it
23 because I am really not -- I don't think anyone has the
24 very clear picture of what the elements of aboriginal
25 rights are and also the extent to which they may be

1 extinguished through certain legislative or executive
2 acts. I think those questions are still outstanding.

3 So given that one can't be sure what
4 substance one is to attach to those rights it is
5 difficult to answer your question. I guess I can say
6 this: Whatever rights may ultimately at some future
7 time be identified as aboriginal rights, would be
8 rights other than the interest of the province within
9 the meaning of Section 109 of the Constitution Act.

10 Q. And Section 109 is that section of
11 the Constitution which is the origin constitutionally
12 of Ontario's authority with respect to natural
13 resources; is it not?

14 A. Yes. I think that it is worthwhile
15 to have -- what I have done with your indulgence, I
16 just quickly jotted out Section 109 on an overhead
17 slide and I think it would be worth the attention of
18 the Board to actually perhaps be provided with a hard
19 copy of the section because I think it is an important
20 section.

21 I am not sure if you are intending to
22 pursue discussion along Section 109 but, if you are, I
23 think it may be a good idea to have that section
24 before the Board.

25 MR. COLBORNE: Mr. Chairman, I am in your

1 hands. I will just say this: I don't want black
2 letter law filed as if it is fact, it's not facts and I
3 would object to any party bringing in cases or statutes
4 and trying to make them exhibits, but if the witness
5 wants to --

6 THE CHAIRMAN: No, but I think what he
7 is trying to indicate -- he would be putting the actual
8 wording of the section before us.

9 MR. CRYSTAL: Yes.

10 THE CHAIRMAN: Which would be in context
11 with the questions you are now going to ask.

12 MR. COLBORNE: That's fine. Let's do
13 that.

14 MR. CRYSTAL: I don't mean it as an
15 exhibit or anything. If we are going to talk about
16 Section 109, I think it is going to be very useful for
17 the Board.

18 THE CHAIRMAN: Why don't you just put it
19 up on the overhead and allow Mr. Colborne to ask the
20 questions based on it.

21 MR. CRYSTAL: I apologize. At the end I
22 started to run out of a little bit -- run out of space,
23 so maybe they have forgotten to add it to -- I think it
24 is that part in read at the bottom that I squeezed into
25 the bottom which is the part of the section that is

1 important at least to the purposes of our discussion
2 here. I'm not sure if that's --

3 MR. COLBORNE: Q. I believe, sir, that
4 you have just agreed with me that this is the
5 constitutional provision which is the origin or the
6 bedrock, as it were, of Ontario's title as against
7 Canada to natural resources?

8 MR. CRYSTAL: A. Well, title is maybe
9 not the word that I would use.

10 Q. Well, unless it is very, very
11 important; whether the word title is used or not, you
12 don't have to proceed with that.

13 In terms of the divisions of jurisdiction
14 between Canada and Ontario, do you agree that that is
15 how Ontario, as a province, gets authority over natural
16 resources; that's the section that you look to?

17 A. Yes, that's one of the sections that
18 you look to in the Constitution. I think when we talk
19 about a proprietary interest in lands and resources,
20 this is the section that we look to and I would use the
21 word proprietary interest rather than title.

22 Q. That's fine.

23 A. But I think that there are other
24 sections of the Constitution, subsections or heads of
25 Section 92 which I think speak to -- well, I guess, the

1 province has power to make legislation in relation to
2 matters of a purely local or public nature and also
3 matters relating to property and civil rights.

4 And I think that they are - and I can't
5 cite the authority - but I think there is some
6 authority for suggesting that some of Ontario's powers
7 of management, powers to enact legislation regarding
8 natural resources flows from those sections.

9 This is one of the difficulties, one of
10 the very difficult concepts in this whole area is the
11 distinction between proprietary interest and
12 legislative power. And this is the section which
13 gives -- which speaks to Ontario's proprietary interest
14 in lands and resources but heads of Section 92 I
15 believe that speak to Ontario's power to enact
16 legislation in relation to natural resources.

17 Q. Okay. But if we just restrict
18 ourselves to Indian treaty rights, Canada could not
19 enact under its powers to make legislation as
20 enumerated in Section 92 in such a way as to --

21 A. Sorry, Canada couldn't enact...?

22 Q. Excuse me, Ontario could not, to
23 eliminate Indian treaty rights. I think you have
24 already said that that's in your materials?

25 A. Ontario could not enact legislation

1 which was in relation to Indians and lands reserved for
2 the Indians which had that effect, I agree with that.

3 Q. Okay. So in terms of I think you
4 said proprietary interest.

5 A. Yes.

6 Q. This is where you go.

7 A. For the proprietary interest.

8 Q. Yes.

9 A. Yes.

10 Q. This Section 109?

11 A. Yes.

12 Q. And in red at the end of it,
13 according to what we have on the screen, there are
14 qualifying words.

15 A. Yes.

16 Q: Subject to any trust existing in
17 respect thereof, and to any interests other than that
18 of the province in the same."

19 A. Yes.

20 Q. Now, a few minutes ago I had asked
21 you whether you agreed with the statement that at page
22 18 in the Canadian Bar Association Report that said
23 that rights of native people are an interest other than
24 that of the province.

25 I won't try to paraphrase your answer,

1 but when that answer is used in the Canadian Bar
2 Association document they are, wouldn't you agree,
3 deriving that phrase from what we have on the screen?

4 A. Oh yes.

5 Q. The phrase as appears in Section 109?

6 A. Oh yes. I am sure -- it says within
7 the meaning of Section 109 and it says that right in
8 the text.

9 Q. So do you come to the conclusion that
10 Ontario's proprietary interest in natural resources is
11 subject to in the plain English meaning of the words,
12 any interest other than that of the province?

13 A. Do I agree that that is what Section
14 109 says?

15 Q. Yes.

16 A. Yeah. Well, yes.

17 Q. And if the authors of this Canadian
18 Bar Association publication are right, the proprietary
19 interest in Ontario in things such as lands, mines and
20 minerals is subject to Indian rights, to put it very
21 briefly?

22 A. Well, if you recall my answer to your
23 original question I said -- I qualified it by saying it
24 was difficult for me to respond because I didn't
25 know -- I don't think anyone knows at this stage of the

1 game with any measure of precision what elements are
2 the appropriate elements of aboriginal rights. I think
3 it is easier to talk about treaty rights.

4 But when we talk about aboriginal rights,
5 it is very difficult to determine the substance of
6 those rights. And so I said -- I think I said that at
7 such time as those are more clearly defined I would be
8 prepared to say that those rights were an interest
9 other than that of the province.

10 I think it is worth noting for the Board
11 that the province -- I think at the end of the very
12 last line, is referring to the late Province of Canada
13 not the Province of Ontario.

14 THE CHAIRMAN: Sorry, what was the
15 significance of that, that last comment?

16 MR. CRYSTAL: It says: And any interest
17 other than that of the province in the same -- any
18 interest other than that which the -- prior to
19 Confederation, the Province of Canada had had in the
20 same. That's my interpretation. Do you agree with
21 that?

22 MR. COLBORNE: I --

23 MR. CRYSTAL: You are not giving
24 evidence.

25 MR. COLBORNE: No, I am not giving

1 evidence.

2 MR. CRYSTAL: Okay, that's fine. That's
3 my understanding of that provision though.

4 So what it's referring to, it says: Any
5 interest other than that of the province in the same.
6 What it is essentially saying is that the old late
7 Province of Canada that had some interests, okay, but
8 the new Province of Ontario is getting all these
9 things, lands, mines and minerals subject to any trusts
10 existing in respect thereof and subject to any interest
11 other than that of the late Province of Canada.

12 THE CHAIRMAN: You mean the federal
13 government?

14 MR. CRYSTAL: 'Pardon?

15 THE CHAIRMAN: Meaning the federal
16 government?

17 MR. CRYSTAL: No, the federal government
18 was created in 1867 at the same time that the provinces
19 were. Prior to 1867 the regime of government was an
20 imperial government in which there was the Province of
21 Canada.

22 THE CHAIRMAN: Okay.

23 MR. CRYSTAL: What we sometimes refer to
24 as the late Province of Canada. Any interests which
25 were outstanding for that government and subject to

1 what I have said before, aboriginal rights could very
2 well be such an interest, that's what the province got
3 but it didn't -- what the earlier province didn't have
4 the new province didn't get.

5 THE CHAIRMAN: Okay.

6 MR. FREIDIN: Mr. Chairman, just for
7 clarification purposes in 1840, as I understand the
8 law, Upper and Lower Canada combined to become the
9 Province of Canada. And when the British North America
10 Act was passed in 1867 it ended up having Quebec in
11 Ontario.

12 MR. CRYSTAL: That's correct, but you
13 also, of course, had the federal government. That is
14 the unique part of Confederation.

15 MR. COLBORNE: Q. Mr. Crystal, I want
16 you to leave that up, but let's go forward to page 22.

17 MR. CRYSTAL: A. Okay.

18 Q. The first paragraph that begins on
19 that page, I will read you the first sentence:

20 "The extent of the content of aboriginal
21 rights or titles unknown."

22 Is that sort of, in summary fashion, what
23 you said in answer to my question a few moments ago?

24 A. Yes.

25 Q. Okay, let's go on.

1 "Although the courts have readily
2 accepted traditional harvesting
3 activities of hunting, fishing and
4 trapping as falling within the doctrine,
5 the right to use other surface and
6 sub-surface resources has not been
7 settled."

8 A. I am not sure what the doctrine is
9 there.

10 Q. Either am I. Well, do you not know
11 what that sentence means?

12 A. How could I if I don't know what the
13 word doctrine means.

14 Q. Well, if you were giving me an honest
15 comment now, I'll spend a little time.

16 A. How can you say it falls within the
17 doctrine if you are not aware of what the doctrine is
18 that's before you.

19 Q. Well, sir, you are a witness here and
20 I believe you are being honest.

21 THE CHAIRMAN: I think they might be
22 referring on page 21, top of the second paragraph
23 where it says: "Despite this lack of clarity,
24 political and judicial acceptance of the continued
25 applicability of the doctrine of aboriginal title has

1 given rise..." et cetera.

2 MR. COLBORNE: Thank, Mr. Chairman. I
3 think that is probably what they are referring back to.

4 MR. CRYSTAL: Okay.

5 MR. COLBORNE: Q. Now, witness, please
6 assume that what the Chairman has identified is what is
7 meant by doctrine. I want to ask you about the first
8 half of that sentence:

9 "Although the courts have readily
10 accepted harvesting activities of
11 hunting, fishing and trapping as falling
12 within the doctrine..."

13 Now, first of all, do you agree with
14 that?

15 MR. CRYSTAL: A. Well, we get into -- it
16 seems to me it is necessary in order to discuss this
17 and I apologize for having to get into subtle and
18 complex issues, but it seems to me necessary to talk
19 about the treaty-making process and to what it
20 surrendered and what it didn't surrender and its
21 validity because I take it when we talk about
22 aboriginal rights what we are talking about is existing
23 aboriginal rights.

24 Now, if those aboriginal rights were
25 surrendered by a treaty - and I am not saying that they

1 necessarily were - but if they were, then in any
2 particular area the practices of hunting, trapping and
3 fishing might not be existing aboriginal rights because
4 they might have been surrendered through the
5 treaty-making process.

6 Q. Okay. But let's just assume that
7 they are existing.

8 A. Then let's assume that we are talking
9 about an area that has never been the subject of a
10 treaty.

11 Q. Okay. Then do you agree?

12 A. If we are talking about an area that
13 has never been the subject of a treaty, then I think it
14 would be fair to say that hunting, fishing and trapping
15 would be aboriginal rights within that area, yes.

16 Q. Okay. Now, let's take another area
17 that is subject to a treaty but that treaty contains
18 hunting, fishing and trapping rights reserved therein
19 to the Indians.

20 So let's take those two cases, okay, the
21 one being the one that you described, the one being the
22 one that I have now mentioned.

23 The first one, is that an interest other
24 than the province in the same, an unsundered
25 aboriginal interest in that unsundered area?

1 A. In the unsundered -- the area that
2 has never been -- yes, I would think it still remains
3 undefined. We described a few elements of it, it would
4 still remain undefined, but I believe that that would
5 be an interest other than the province in the same.

6 Q. And the second case where there has
7 been a treaty but that treaty contains reference to say
8 hunting, fishing and trapping rights on the Indians.
9 Is that an interest other than that of the province in
10 the same, in your view?

11 A. Well, the treaties also contain
12 another provision about save and except for certain
13 areas. So if you are ready to put that in the pot as
14 well.

15 Q. I ready, go ahead, it is in and now
16 can you answer the question.

17 A. Subject to all of those
18 qualifications, I would agree that it is.

19 Q. Now just so I can be certain, let me
20 give you a concrete as opposed to just a theoretical.

21 You know enough about the treaty with
22 which my clients are concerned, Treaty 3, to answer
23 this question. I think you attached the English
24 version of the treaty to your materials.

25 In the territory covered by this treaty,

1 do you agree that the treaty provides for hunting and
2 fishing rights, Treaty 3 has a hunting and fishing
3 rights provision?

4 A. I don't know that -- I think it is
5 plain from the words of the treaty that it speaks to
6 those issues, yes.

7 Q. Well --

8 A. Do you want me to read that portion
9 of the treaty?

10 Q. No, I just asked you: Does Treaty 3
11 contain a hunting and fishing rights provision, yes or
12 no, if you can?

13 A. Yes.

14 Q. Yes. And in the Treaty 3 area, in
15 the territorial area are there Crown lands that have
16 been not been taken up for use of the various types
17 contemplated in the treaty? Is there still that type
18 of land in the Treaty 3 area?

19 A. I would have to guess and say yes.

20 Q. Okay. My question is this: In such
21 land is Ontario's proprietary interest in the resources
22 subject to, those are the words of Section 109, subject
23 to those hunting and fishing rights?

24 A. Well, you will recall I said from
25 time to time, save and excepting from time to time

1 clause those treaty rights may disappear if particular
2 areas which are, from time to time, taken up for those.

3 So when you say do those rights exist,
4 they exist but they exist in a rather femoral state
5 because at any particular time, if that area where
6 those rights are sought to be exercised are taken up
7 for one of those purposes, they will cease to exist in
8 those places at least according to the scheme of the
9 treaty.

10 Q. Yes, but let's forget about areas
11 that are from time to time or have been taken up. I am
12 asking you about areas that have never been taken up.

13 A. Yes, but those areas which have never
14 been taken up are areas that could potentially be taken
15 up.

16 Q. Well, I don't know that that's
17 responsive sir. My question is: In areas that have
18 never been taken up, is Ontario's proprietary interest
19 or title subject to the hunting and fishing right in
20 the treaty?

21 A. When you qualify that right by saying
22 that at any particular jtime the right could disappear
23 if that area where right is sought to be exercised is
24 taken up, if you qualify it in that way, taken up for
25 mining or lumbering or whatever, other purposes, if you

1 qualify it in that way, for the moment in time when it
2 has not been so taken up, yes.

3 Q. Okay. But if taken up it has jto be
4 bona fide, right, it has to actually be taken up, it
5 can't be simply the stroke of the provincial pen saying
6 we want to get some more Indian resources and so,
7 therefore, we will pass some legislation saying: By
8 definition it has been taken up. Manitoba triedthat,
9 didn't they and they got slapped down, it has to
10 actually be needed and used?

11 A. I would think at least in Ontario the
12 determination of whether or not something has been
13 taken up is somewhat unclear.

14 Q. Do you agree with me that Ontario at
15 one point by Order-in-Council tried to declare that the
16 entire province had been taken up so that the Indians
17 didn't have any title or claim to title?

18 A. In my experience I have seen so many
19 strange things and I don't doubt that that is entirely
20 possible. I am not aware that that happened.

21 Q. Sir, we were looking at page 22.

22 A. Yes.

23 Q. And we are looking at the beginning
24 of that paragraph, the first one that begins on the
25 page and I have now concluded my questions about the

1 first part of the second sentence.

2 I now want to ask you about the second
3 part of the second sentence which reads:

4 "The right to use other surface and
5 sub-surface resources has not been
6 settled."

7 Do you agree or disagree?

8 A. Agree.

9 Q. Now, further down in that paragraph
10 the authors of this report express some surprise that
11 there seemed to be so little effort to clarify that and
12 perhaps I will just read to you from the last two or
13 three sentences:

14 "In other words, litigation could be
15 pursued under current law --"

16 A. Where are you reading from? Okay, I
17 have got it.

18 Q. "...could be pursued under current
19 law that could freeze billions of
20 dollars of investment and affect tens of
21 thousands of jobs. Aboriginal groups
22 have been reluctant to force these issues
23 to date in part due to their sensitivity
24 to the impact on third parties and public
25 attitudes. Nevertheless, the opportunity

1 is clearly present and the availability
2 of effective alternatives is
3 disappearing. It is particularly
4 surprising to see the lack of commitment
5 and initiative on the part of federal and
6 provincial governments in addressing
7 these issues in light of the potentially
8 drastic consequences of inaction."

9 Do you agree with that?

10 A. No, I don't think I do.

11 Q. What parts of it do you not agree
12 with?

13 A. I don't believe that there was a lack
14 of commitment or initiative at least on the part of the
15 provincial government to address the issues.

16 Q. That is the Government of Ontario
17 that you are referring to?

18 A. That's correct.

19 Q. So you are saying, I take it, that
20 the authors of this report are wrong, at least insofar
21 as Ontario is concerned, or are you saying it anything
22 more broader than that?

23 A. That's all that I can speak to.

24 Q. Now, I am almost at the end of this
25 references to this publication, but if now is the

1 time --

2 THE CHAIRMAN: All right. Perhaps rather
3 than entering into a new area we can break for lunch
4 now because we can probly use the time ourselves.

5 MR. CRYSTAL: Oh, you were finished. You
6 just have a few moments left.

7 THE CHAIRMAN: Oh, sorry.

8 MR. COLBORNE: I only had two or three
9 more questions with this publication.

10 THE CHAIRMAN: Oh, sorry, certainly
11 complete that.

12 MR. COLBORNE: Q. Sir, please go ahead
13 to page 49 of the report. A little below the midway
14 point on that page, at the end of the paragraph appears
15 the following sentence:

16 "Quite obviously the aboriginal people
17 have an expanded view of the treaties
18 beyond a cash for land bargain and beyond
19 assurances for continued hunting and
20 fishing rights."

21 In general, do you agree with that as a
22 statement of fact, in your experience?

23 A. That the aboriginal people have that
24 view.

25 Q. Yes.

1 A. Yes, I do.

2 Q. And if you could turn the page to
3 page 50, just above the middle of the page, the
4 following sentence appears:

5 "To them..."

6 And this is referring to Indians:

7 "...if only the written text of the
8 treaty were given effect, the result in
9 most instances would be to condone fraud
10 and mistake:

11 Do you agree that that's the view of --
12 general speaking, that is the view of Indians on this
13 matter?

14 A. Well, I am glad you mentioned
15 generally speaking because I was thinking of qualifying
16 my previous answer by just saying that that's so
17 ingeneral, I am not sure that all aboriginal people
18 have the view that's expressed on page 49.

19 I certainly have been involved in
20 conversations and discussions with some Indian people
21 who have expressed that view.

22 Q. Could we go forward please, sir, to
23 page 54. There is a heading on this page called
24 Failure of Specific Claims Policy and the first
25 sentence under that heading reads:

1 "The specific claims process has not
2 proven to be an effective process or
3 forum in which the treaty issues can be
4 addressed."

5 First of all, sir, would you agree with
6 me that they are referring to a federal government
7 process?

8 A. Well, I do -- I am somewhat familiar
9 of something -- a policy of the federal government that
10 is quite often referred to as the specific claims
11 policy. Without reading the document and understanding
12 the context it is difficult for me to say whether this
13 specific claims process which is noted here is indeed
14 of the federal policy, but I am aware of a federal
15 policy that is called a specific claims policy.

16 Q. Okay. Please assume for purposes of
17 my question, my next question or two that the policy
18 you are familiar with is the one that is referred to
19 here both as a policy and a process.

20 A. Yes,

21 Q. Now, my next question is: The land
22 claims that you have been involved with where the
23 federal government has also been involved, have they
24 been dealt with by the federal government under the
25 terms of that policy?

1 A. Well, the policy has always been a
2 big issue, that policy has always been a big issue in
3 any of these discussions. It seems to me I have been
4 involved in a land claim where it was proposed that the
5 negotiator or the staff would go to the Federal Cabinet
6 to ask permission to override that policy and then,
7 subsequently, the federal government agreed to
8 participate in the negotiating process.

9 And now I can't quite recall whether that
10 decision was reached because it subsequently said: Ah,
11 we are within the policy, or if they said our Cabinet
12 has permitted us to go beyond the policy.

13 But it seems to me that whatever the case
14 was it was within the contemplation of the federal
15 staff that there was a possibility to proceed with a
16 land claim outside the policy in exceptional
17 circumstances.

18 Q. Okay. Sir, I think we may be off on
19 a tangent here and I think I may have led the way.
20 Let me try to get back to the question I was hoping to
21 ask.

22 Do you agree that the manner in which
23 specific claims has been handled has not proven to be
24 an effective process or forum?

25 A. Are you referring to the federal

1 policy?

2 Q. I was trying to get away from a lot
3 of hair splitting, but if we have to --

4 A. Well, I think if you are asking me to
5 comment on a policy I don't think the question of
6 whether or not the federal policy or the provincial, or
7 the overall -- if you are asking me to comment on the
8 federal policy or you are asking me to comment on the
9 total process in which the provincial government
10 participates, I don't think that's hair splitting.

11 Q. I was just trying to get an answer.
12 Okay, we'll go back. Let's do federal first.

13 A. Okay.

14 Q. Let's assume this statement is
15 referring to the federal policy that you have
16 mentioned.

17 A. Yes.

18 Q. Do you agree with it?

19 A. It has been my experience that the
20 federal guidelines are sometimes too restrictive and do
21 not always promote negotiated settlements.

22 Q. Does Ontario have any comparable
23 written guidelines or policy?

24 A. Not to the extent that the federal
25 government does.

1 Q. Well, yes or no? Is it a smaller
2 one, is that what you mean?

3 A. Ontario is guided by some very
4 general terms.

5 Q. Reduced to writing?

6 A. Yes, in a Cabinet document but I
7 think that I can summarize it. It is no great mystery.

8 Q. Just a moment. When you say Cabinet
9 document, are you referring to something for which
10 privilege would be claimed?

11 A. My counsel would have to respond to
12 that.

13 MR. FREIDIN: Yes, I don't have
14 instructions to waive cabinet privilege on this
15 particular matter.

16 THE CHAIRMAN: So this Cabinet policy has
17 not been made public, is that what you are saying?

18 MR. CRYSTAL: I am not sure about that.
19 It may have been made public.

20 THE CHAIRMAN: Surely if it is in the
21 public domain it can't be privileged in that sense, can
22 it, Mr. Freidin?

23 MR. COLBORNE: Mr. Chairman, Can I just
24 ask for an undertaking because it may be that Mr.
25 Freidin isn't familiar enough that he could really

1 respond, to be fair.

2 My request is that the document or
3 documents that the witness is referring to, would they
4 be furnished to me if no privilege is claimed and, if
5 privilege is claimed, could I be advised of the nature
6 of the privilege.

7 MR. FREIDIN: Yes.

8 MR. COLBORNE: Thank you.

9 Q. Now, Mr. Crystal, maybe my last
10 question.

11 A. Okay. If I could just explain that a
12 little bit. It is not nearly as mysterious as it
13 sounds. Essentially what those instructions are as to
14 say that Ontario will be guided by legal obligation and
15 fairness where -- there may be some situations where
16 there is no strict legal obligation but, as a matter of
17 fairness, Ontario will enter into negotiations for the
18 settlement of a land claim. That's essentially what
19 the policy is.

20 And that is the guidance -- when I say
21 that there is no guidelines in the way that the federal
22 government is guided, it is that -- it is essentially
23 what I have just described to you.

24 Q. I was interested in you saying that
25 Ontario would enter into negotiations. Will Ontario

1 also actually settle something on the basis of
2 fairness?

3 A. Yes.

4 Q. But hasn't yet? This is a statement
5 of intention as opposed to a track record you are
6 referring to?

7 A. That's correct.

8 Q. Page 58, Recommendation 15. I will
9 read it:

10 "The federal government should undertake
11 immediate measures to remedy those treaty
12 related grievances that have been
13 thoroughly examined, such as the
14 continued impairment of hunting, fishing
15 and gathering rights."

16 Now, sir, I realize that's a
17 recommendation addressed to the federal government, but
18 would you agree that treaty related grievances of those
19 types have in fact been thoroughly examined?

20 A. Would I agree that those grievances
21 have been thoroughly examined?

22 Q. Yes.

23 A. The question that comes to my mind
24 is: Thoroughly examined by whom?

25 Q. Let's go back to page 22 then, the

1 beginning of the first full paragraph that we examined
2 before. The first part of the second sentence:

3 "Although the courts have readily
4 accepted traditional harvesting
5 activities of hunting, fishing and
6 trapping as falling within the
7 doctrine..."

8 Now, let me suggest this to you: That
9 the authors of this report are saying in at least those
10 two locations that when you get down to things like
11 hunting and fishing they have not only been fully
12 accepted as items of right by the courts, but have also
13 been, as the words appear on page 58, thoroughly
14 examined and, therefore...

15 A. Thoroughly examined by courts, is
16 that what you are saying?

17 Q. I don't know. I am just suggesting
18 to you what the authors are saying here. They should
19 be taken out of that category of rights which are so
20 totally undefined that nothing can be done about them
21 until they were defined?

22 A. I see.

23 Q. Do you think that that may be what
24 the authors here are saying, that we can't just say
25 that everything that is preceded by the adjective

1 Indian or aboriginal can be set to one side because we
2 can say it has been undefined so we can ignore it for
3 another ten years.

4 Aren't they saying that there are some
5 things like hunting and fishing rights that have been
6 accepted by the courts, they have been looked at ten
7 times over by a hundred branches of government and it
8 is now time to do something about them?

9 A. All right. Well, I think that I
10 mentioned earlier the government of Ontario at least is
11 always involved, when it's dealing with these issues,
12 in a process of balancing interests and I think my own
13 personal belief is that it is possible to balance those
14 interests in a way that's different from the current
15 regime that we have that will be more satisfactory
16 towards Indian people.

17 I focus on the word remedy in that. If
18 remedy means achieving that balance that I described,
19 then I would agree with it.

20 Q. Page 83, please, Recommendation 24.
21 In this recommendation the authors of the report are
22 saying that there ought to be for specific claims a
23 tribunal to adjudicate and if I am not mistaken about
24 the surrounding text, the reason why that
25 recommendation is made is because these claims have not

1 been settled under the current policies.

2 In your experience, having dealt with
3 specific claims, do you agree, if you had been a member
4 of the committee that wrote this report, would you have
5 concurred in that recommendation?

6 A. I would adopt it wholeheartedly. I
7 would certainly see it as a recommendation that
8 deserves some study. My fear would be that such a
9 tribunal might, at some point, or might even initially
10 be another layer of bureacracy that made even more
11 difficult for native people to achieve their desires.

12 Q. But you have said that up until now
13 nothing has been settled in terms of specific claims in
14 Ontario with maybe one or two exceptions?

15 A. That's correct.

16 MR. COLBORNE: Mr. Chairman, I am
17 finished with this particular publication.

18 THE CHAIRMAN: Very well. Thank you, Mr.
19 Colborne.

20 We will continue after the lunch break at
21 two o'clock.

22 ---Luncheon recess taken at 12:35 p.m.

23 ---Upon resuming at 2:05 p.m.

24 THE CHAIRMAN: Thank you, be seated.
25 When you are ready, Mr. Colborne.

1 MR. COLBORNE: Thank you, Mr. Chairman.

2 Q. Mr. Crystal, I would now like to ask
3 you a few questions arising out of the transcript of
4 your evidence as given September 7th.

5 In that oral evidence I think you
6 expanded on and added to your written evidence to a
7 certain extent and it will primarily be those
8 additional comments that my questions now will be
9 addressed to.

10 MR. CRYSTAL: A. Yes.

11 Q. You have a copy for reference; do
12 you, sir?

13 A. I do.

14 Q. At page 7462, please. Just after
15 where you have read the text of Section 35(1) of the
16 Constitution Act into the record you say that, as you
17 had noted on the slide:

18 "It is clear since the enactment of
19 Section 35(1) that there is now
20 constitutional protection for treaty and
21 aboriginal rights, but the issue which
22 remains undefined to date is what
23 substance ought to compromise those
24 treaty and aboriginal rights..."

25 A. Comprise, what substance ought to

1 comprise...

2 Q. Excuse me. "...ought to comprise
3 those treaty and aboriginal rights and
4 there is still today great disagreement
5 on that issue."

6 My question is this - and this is a bit
7 of a transition from my questions concerning the
8 Canadian Bar Association document where a tribunal was
9 recognized or was recommended.

10 The question is: What is to compel, or
11 what is to put any pressure at all on the government to
12 overcome this disagreement and actually come to a final
13 point in time where it can be said that agreement has
14 been reached?

15 Is there anything procedurally or even
16 within Ontario government policy or anything that you
17 can think of that would provide impetus towards
18 settlement?

19 A. Well, I think that the Ontario policy
20 on self-government is more or less embodied by the
21 declaration of political intent that is appended to my
22 evidence package. So I think that, first of all, there
23 is a commitment - and I am not sure this speaks
24 directly to your question - but there is a commitment
25 by the Government of Ontario to enter into

1 self-government negotiations with First Nations in
2 Ontario.

3 Q. I am thinking of something different
4 than just political statements.

5 A. Okay. You asked me -- one of the
6 things you said: Is there a policy.

7 Q. I am asking if there is anything
8 other than orally and perhaps in letters expressed
9 goodwill? Is there anything --

10 A. Well, then you are really, just a
11 mere policy statement then, because I think that would
12 fall into the category that you have described.

13 Q. Okay. What policy statement then?

14 A. I think the policy that's represented
15 in the declaration of political intent that Ontario is
16 committed to enter into self-government negotiations
17 with First Nations in Ontario.

18 Q. So that's --

19 A. That's one thing. I mean I haven't
20 completed my answer to your question yet.

21 Q. But there is no statement of policy
22 that you have been referring to separate from the
23 document that you have been referring to?

24 A. There also is a statement -- it is
25 also Government of Ontario policy that Ontario is

1 committed to entering into self-government negotiations
2 with the First Nations in Ontario.

3 Q. Well, we are talking now about the
4 lack of definition of treaty and aboriginal rights.

5 A. Yes, that's why I said --

6 Q. And you are saying that Ontario has a
7 policy commitment to discussing -- what is it?

8 A. Entering into self-government
9 negotiation.

10 Q. Self-government.

11 A. I first want to admit that I am
12 trying to approach your question in the best way that I
13 can. Maybe that's not the most direct route.

14 I guess why I raise it is because by
15 entering into those self-government negotiations, it is
16 my hope that there would evolve a meaning for
17 aboriginal and treaty rights, there might and there
18 might not, but that's one possibility.

19 You asked the question -- I understand
20 your question, what is there that's pushing the
21 government into clarifying that issue. That's really
22 what your question is.

23 Q. Well, may I rephrase the question
24 because otherwise we are going to be here all day?

25 A. Okay.

1 Q. Yes or no, there is nothing other
2 than statements of goodwill compelling Ontario as a
3 party to these negotiations towards settlement; am I
4 not correct?

5 There is no outside pressure, no outside
6 force compelling Ontario to move towards settlement?

7 A. Well, there are some cases in
8 litigation concerning fishing rights, for example, and
9 I suppose that's another motivating factor and there is
10 political pressure that can be brought to bear and is
11 being brought to bear by native people in Ontario, and
12 that is another motivating factor.

13 And then there is -- and I don't down
14 downplay what I would think is Ontario's commitment to
15 trying to resolve some of these issues and I really do
16 believe that there is such a commitment.

17 Q. Let me put it this way: There are
18 are no procedural devices, as lawyers understand that
19 phrase, available to any party to compel another party
20 to get moving; are there?

21 A. At the present time, no. I think
22 that the constitutional conference process that was set
23 out -- certainly not a process that could compel any
24 parties but it was one that could facilitate the
25 parties to come up with some further delineation of

1 those rights.

2 But at the present time, as I said
3 earlier, there is no immediate plans for any
4 constitutional conference to add more substance to this
5 provision, Section 35(1). And so there is, you are
6 absolutely right, there is no procedural legal
7 mechanism to compel any of the parties to clarify the
8 issues that remain in dispute or unresolved.

9 Q. Right. So any party naturally at its
10 own risk from the point of view of political factors
11 and what might happen in court and so on, but any party
12 could stall forever, if it wanted to?

13 A. Well, no, I am not sure that it
14 could, because I think that there is perhaps political
15 pressure that would come to bear ultimately. I don't
16 agree that it could be stalled forever.

17 Q. At page 7464, I want to read part of
18 a sentence which begins in the middle of line three.

19 "There can be very little doubt that when
20 we interpret those treaty aboriginal
21 rights they would..."

22 A. I am sorry, hold it. I am sorry,
23 what was the page, 7463?

24 Q. 7464.

25 A. 64, and at line 3?

1 Q. Yes.

2 A. Yes.

3 Q. Partway through line 3:

4 "There can be very little doubt that when
5 we interpret those treaty and aboriginal
6 rights they will have impact on
7 the way that natural resources are dealt
8 with in native issues."

9 A. Yes.

10 Q. My question is: What do those last
11 three words means? Why are they tagged on?

12 A. I suppose the fact that I have spoken
13 about treaty and aboriginal rights, they are somewhat
14 redundant at that point in the sentence.

15 Q. Would you still agree with the
16 sentence if we just put a period before the last three
17 words?

18 A. Well, it is unfortunate that the
19 sentence would end with a preposition, but yes.

20 Q. Over to the next page, please, sir,
21 page 7465. I just want to read you the first part of
22 text of your evidence beginning at line 18.

23 "1763 is certainly an important date in
24 Canadian history. The British French
25 conflict in North America had just

1 concluded and we are all familiar with
2 the Battle of the Plains of Abraham and
3 Wolfe and Montcalm."

4 Now, surely you are not telling us that
5 the Battle of the Plains of Abraham took place in 1763?

6 A. No.

7 Q. It actually took place in 1759,
8 right?

9 A. That's correct. It occurred some
10 years before, is it not 1760. Somehow that date rings
11 in my mind. I am not sure, but it was before -- 1763
12 was the date of the Proclamation which was after the
13 Battle of the Plains of Abraham.

14 Q. Okay. Can I just ask you this: Do
15 you have any qualification or training as a historian?

16 A. No, I don't.

17 Q. Now, you did in your evidence though
18 make some comments of a historical nature. Are you
19 quite confident that you were correct in each instance
20 or...

21 A. Well, in my -- I find that it is
22 difficult to deal with the law in these matters without
23 becoming somewhat acquainted with the history.

24 Q. Okay.

25 A. But I would certainly bow to better

1 expertise than mine in terms of history.

2 The statements that are made in respect
3 of history are matters which I developed an
4 understanding of just through my experience and my
5 work, but I don't have any formal training. And, as I
6 say, if there is better historical evidence forthcoming
7 from an expert, I would certainly suggest that that
8 expert ought to be listened to rather than myself.

9 Q. Very well. Partway down page 7456,
10 beginning at line 15, if I understand what you said
11 correctly, you are giving some general background
12 reasons for the making of the Royal Proclamation of
13 1763 and the words I want to read to you are:

14 "Most of the inhabitants of this new
15 territory were Indian people, and so it
16 was necessary in the Royal Proclamation
17 to set out an Indian policy."

18 A. Yes.

19 Q. Isn't it a fact, sir, that the Seven
20 Years War had just concluded and most of the combatants
21 in North America were Indian people and that's what the
22 policy had to do with?

23 A. I think that was a factor as well. I
24 think it also had a factor to do -- another factor I
25 think leading to the Royal Proclamation was to try to

1 ensure against conflict or to try to help against
2 conflict between native people and European settlers.
3 I think that's another factor as well.

4 Q. At the bottom of that page, 7466, you
5 say that:

6 "The Royal Proclamation sets out certain
7 rules for one trade..."

8 And flipping over to the next page:

9 "...to travel."

10 A. Yes.

11 Q. And I believe your evidence to be
12 that these didn't have anything to do with Indian
13 policy, they were examples of other things that appear
14 in the Proclamation?

15 A. Well, no, I wouldn't say that they
16 had nothing to do with Indian policy. They weren't
17 Indian policy in as direct a way as those provisions of
18 the Royal Proclamation that dealt with surrender of
19 land, but given that the lands to which people would be
20 travelling through would be inhabited by Indian people
21 and trade would quite often be with Indian people, I
22 suppose it would be correct to say that that was Indian
23 policy as well in a less direct sort of way.

24 Q. Well, I am not sure what you are
25 saying now, sir, so perhaps you could refer me, for

1 instance, to the provision in the Royal Proclamation
2 that has to do with travel.

3 MR. COLBORNE: That would be Document No.
4 1 commencing at page 183 of the material, Mr. Chairman.

5 Q. And, Mr. Crystal, I am not intending
6 to ask you a trick question or anything, let me tell
7 you what I am getting at there.

8 MR. CRYSTAL: A. Yes.

9 Q. When I read the transcript I was
10 thinking back and thought: I don't remember anything
11 in the Royal Proclamation about travel and then I went
12 and read it myself and I couldn't find anything about
13 travel in there even when I read it. So maybe I am
14 just misunderstanding your evidence.

15 A. If I may look through it, I may be
16 mistaken. I have certainly read the Royal Proclamation
17 over and over many times and I was left with the
18 impression that it did, but if you will just give me a
19 moment. If you say that you have read through it and
20 didn't come up with...

21 Q. As I say, it may be a question of
22 interpretation.

23 A. Yes.

24 Q. So would you be referring to the
25 provisions that have to do with apprehending fugitives

1 who go into Indian territory?

2 A. That would be -- if you could give me
3 a moment--

4 Q. Oh sure.

5 A. --to look through it and I will
6 advise you.

7 MR. FREIDIN: Mr. Chairman, I am just
8 wondering if in fact Mr. Crystal would like to take the
9 time, and I think he should obviously be allowed to.
10 As long as there is not a lot of other questions
11 arising out of the answer, perhaps Mr. Crystal could do
12 this during the break or tonight and deal with it
13 tomorrow.

14 MR. COLBORNE: I think that's a wise
15 suggestion, Mr. Chairman.

16 MR. CRYSTAL: Okay.

17 MR. COLBORNE: I wasn't attempting to
18 slow down the proceedings. These are legitimate
19 queries, but I know that they might take a while to
20 answer.

21 THE CHAIRMAN: Okay. This panel will
22 obviously be here the rest of the week and into next
23 week. So, Mr. Crystal, if you would take the time
24 tonight--

25 MR. CRYSTAL: Sure.

1 THE CHAIRMAN: --and then perhaps
2 tomorrow answer this particular question Mr. Colborne
3 has posed.

4 MR. COLBORNE: and let me ask now, Mr.
5 Chairman, a few related questions and they all fall
6 into the same category.

7 THE CHAIRMAN: Well, will it require his
8 reading this document?

9 MR. COLBORNE: Yes.

10 THE CHAIRMAN: Okay. You might as well
11 put them all at once and then he can answer them all
12 tomorrow.

13 MR. COLBORNE: Q. Tell me where in the
14 Royal Proclamation it refers to trade in the sense that
15 you use that term at the bottom of page 7466 of the
16 transcript?

17 Tell me in what respect the Royal
18 Proclamation is: "To a great extent, had nothing to do
19 with Indian policy at all."?

20 A. Where is that?

21 Q. The second to fourth line at the top
22 of page 7467.

23 A. I am sorry?

24 Q. I will read the words again. The
25 second to fourth line at the top of 7467: "To a great

1 extent had nothing to do with Indian policy at all."

2 My question is: Could you give me an
3 outline of those matters addressed in the Royal
4 Proclamation that had nothing to do with Indian policy?

5 I think the final question I would
6 have -- oh, no, not quite.

7 THE CHAIRMAN: Could it be put the other
8 way, Mr. Colborne, to outline the matters which had to
9 do with Indian policy, if there were any.

10 MR. COLBORNE: That was my next question.

11 THE CHAIRMAN: Okay, sorry.

12 MR. FREIDIN: I think it just might be
13 difficult for the witness to say what's in there that
14 doesn't refer to something. I mean...

15 MR. CRYSTAL: Well, for example, the
16 establishment of four territories. I don't know
17 that -- maybe it was inappropriate for me to use the
18 words "at all". They should have been directly -- I
19 should have used the words directly affecting Indian
20 policy or words to that effect.

21 MR. COLBORNE: Q. The next question that
22 I would ask you to consider when you are rereading this
23 is as follows.

24 MR. CRYSTAL: A. Yes.

25 Q. And I refer you to line 7 and 8 of

1 page 7467: That Indian policy; in other words, the one
2 in the Royal Proclamation, can really be summarized in
3 two points.

4 The question is: After you reread the
5 Proclamation, do you still agree with that statement?

6 A. Okay.

7 Q. Now, sir, on the next page of the
8 evidence, 7468, you speculate in a paragraph that
9 begins on line 14 and ends on line 22 as to what the
10 intention of the British Government of the day was.

11 A. Yes.

12 Q. Do you believe that professional
13 historians who have studied that era of British history
14 would agree with you, 'or do you know?

15 A. I don't know that I am qualified to
16 say that. It would be my impression that I have
17 derived from my reading of documents and case law.

18 Q. Well, what documents then, because
19 you are not --

20 A. The Royal Proclamation.

21 Q. From reading it you feel able to
22 derive an intention?

23 A. Yes.

24 Q. Okay. But you know nothing about
25 what historians who have studied that era might say; is

1 that what you are saying?

2 A. I am not able to comment on that here
3 and now.

4 Q. So you would be content really if
5 anybody who read the Royal Proclamation wanted to
6 derive an intention that person could?

7 A. I have read -- I can tell you in all
8 honesty that I have read the Royal Proclamation many
9 times in trying to determine what it meant and what it
10 means in the context of our legal system and in the
11 context of policy today.

12 I have come up with some impressions as a
13 result of that exercise. I tried to convey those
14 impressions to the Board. I have no expertise in
15 history and, to the extent that my impressions may be
16 erroneous, I apologize.

17 Q. Well, let me put this to you: You
18 say that you think that it was the plan at that time
19 that lands reserved for Indians would be taken up for
20 purposes of settlement and agriculture and so on.
21 That's what you said the other day; is it not?

22 A. Yes.

23 Q. Do you agree with me that the
24 majority of historical opinion as to the origin of the
25 American Revolution is that it goes back to this

1 document because it prevented the American colonist
2 from spreading into Indian territory, or at least it
3 was interpreted that way?

4 A. I am really not qualified to answer
5 that.

6 Q. At the bottom of page 7468, in the
7 last line at page 25, you say that: Before the year
8 1763, land transactions were, in some cases, filled
9 with "frauds and abuses."

10 My question to you is: Do you believe
11 there have been such frauds and abuses since 1763?

12 A. I suppose that would be a matter of
13 perspective.

14 Q. That is not an answer, sir. What do
15 you believe?

16 A. None that I am particularly aware of.

17 Q. Okay. Let's take out frauds, let's
18 just leave it as abuses. Do you think there have been
19 any abuses since 1763?

20 A. None that I can point to directly at
21 this time.

22 Q. Do you think that there have been any
23 since 1973?

24 A. Not that I am aware of.

25 Q. Do you have any rule within the

1 Government of Ontario in respect of the current issue
2 referred to as Island WD 230, the reserve near Kenora?

3 A. I am aware of that claim, yes.

4 Q. Are you aware of a nine-page letter
5 from the Minister responsible for native affairs
6 explaining errors and so on?

7 A. I have read the letter.

8 Q. You have read the letter?

9 A. Yes. I didn't read it in preparation
10 for this hearing.

11 Q. No, I am not going to ask you any
12 questions about it, sir. Would you characterize that
13 current instance as an abusive one?

14 MR. FREIDIN: Mr. Chairman, I don't know
15 how this is going to be helpful to the Board in its
16 deliberations and, on that basis, I am objecting.

17 THE CHAIRMAN: Well, Mr. Freidin, the
18 witness has made statements in evidence and in his
19 material and counsel is exploring with him whether or
20 not he agrees with some statements that have been
21 referred to.

22 And if he cannot answer them, fine; if he
23 can answer he can do so and the Board will give it
24 whatever appropriate weight it should.

25 Go ahead, Mr. Colborne.

1 MR. COLBORNE: Q. Mr. Crystal, my
2 question was: To the extent that you are familiar with
3 that case and the letter that I have referred to, do
4 you think that was a situation of abuse?

5 MR. CRYSTAL: A. No, I do not.

6 Q. You have already said that you know
7 about the letter so I assume you would agree with me
8 that that is the letter, a copy of it. (handed)

9 A. Yes.

10 MR. COLBORNE: I am asking that this be
11 entered as an exhibit.

12 THE CHAIRMAN: Exhibit 225.

13 MR. COLBORNE: It is a letter dated
14 August 12th, 1988. I almost hesitate to say it is
15 addressed to myself, but it is also addressed to
16 another lawyer and it is signed by Ian Scott the
17 Attorney General.

18 ---EXHIBIT NO. 225: Copy of letter dated August 12,
19 1988 signed by Ian Scott, Attorney
General.

20 MR. COLBORNE: Q. Now, sir, I already
21 mentioned that I was not going to ask you any questions
22 about this, but I want to ask you a related question.

23 You don't think that the topic dealt with
24 here is an abuse, you don't think that there has been
25 any frauds or abuses since 1763, at least none that you

1 know of. May I ask you, what are Indian land claims
2 about?

3 A. Could you be more specific?

4 Q. Are they about frauds and abuses?

5 And if you are bothered by the word frauds, you can
6 just forget about that. Are they about abuses or
7 alleged abuses?

8 A. Sometimes they are about mistakes.

9 Q. Are they about abuses?

10 A. They may be about alleged abuses.

11 Q. And this is the attitude that you
12 bring to land claim negotiations. Surely in over 200
13 years there might have at least been one abuse.

14 A. There might have been.

15 Q. At page 7470, sir, Mr. Martel asked
16 you a question and you gave your answer. I want to
17 read you the question and the answer and ask you a
18 supplementary question.

19 A. Yes.

20 Q. The question was, and I will read
21 only part of it beginning at line 17:

22 "...was it done in a
23 consultative negotiated fashion or was it
24 simply, I am taking a bite of the cookie?

25 MR. CRYSTAL: Well, I suppose, Mr. Martel

1 that is a matter of considerable debate
2 today."

3 My supplementary question on that is:
4 What is the consensus of opinion of professional
5 historians on that question, if you know?

6 A. I am not sure that I could provide an
7 opinion on the consensus.

8 Q. Is that the same as saying that you
9 don't know?

10 A. That is to say that -- you asked me
11 if I could provide an opinion on the consensus of
12 historians and I told you that I couldn't provide an
13 opinion on that consensus.

14 Q. You don't know what the consensus is?

15 A. That's correct.

16 Q. Thank you.

17 A. Or if such a consensus exists.

18 Q. Well, are you familiar with at least
19 some of the literature on that question?

20 A. I have read some, yes.

21 Q. At page 7472, toward the bottom, I
22 would like to read to you beginning at line 21:

23 "The treaties in northern Ontario in
24 general include this term concerning
25 access to natural resources. The

1 treaties in southern Ontario do not
2 include such a term."

3 A. Yes.

4 Q. Sir, is it not true that those terms
5 were included in the northern treaties because it was
6 thought that the Europeans would need very little of
7 the land and, therefore, less was paid by way of
8 annuities and cash but greater assurance was given as
9 to access to the land?

10 A. I have heard that theory espoused. I
11 am not really in a position to answer your question.

12 Q. Did you include in your materials
13 anything on the Robinson treaties?

14 A. Yes.

15 Q. Since you assembled these maybe you
16 could -- here we are. Maybe you could refer me to the
17 page.

18 A. Where the Robinson treaties are set
19 out?

20 Q. Yes. Ah, here we are, 256 of the
21 materials.

22 Now, I see that in the case of the
23 Robinson treaties you included only the treaty and not
24 the report that accompanied it whereas, for instance,
25 in respect to Treaty 9 you included both the treaty and

1 the report that accompanied it.

2 So I suggest that the report that
3 accompanied the Robinson treaties made it quite clear
4 that the Indians were told: We can't pay you as much
5 as in the south, but don't worry we hardly need any of
6 your land anyway.

7 A. Okay. Well --

8 Q. And it is in the accompanying report
9 that is usually looked at as the same time as the
10 treaty itself?

11 A. The copy of the published treaty that
12 I had did not include that material and that is why I
13 didn't include it. If you would like to give evidence,
14 and I am sure your clients -- on behalf of your clients
15 will provide evidence, maybe that would be appropriate.

16 Q. Well, sir, I think it would be quite
17 improper for me to give evidence.

18 Just while we are on this topic of the
19 Robinson treaties, isn't it a fact that these being the
20 first treaties in northern Ontario, generally the first
21 ones within the area of the undertaking, although there
22 may be some slight exceptions, that they were made
23 because minerals had been found; is that not correct?

24 A. I have heard that. I have heard that
25 espoused as well.

1 Q. Well, aren't those the first words in
2 the Commissioner's report that accompanied the return
3 of the treaties?

4 I don't have it before me, but it so
5 often accompanies the treaties that I have seen it
6 often enough I can practically see it before me.

7 "In consequence of minerals being
8 discovered on the north shores of Lake
9 Huron and Lake Superior we went out and
10 tried to make a treaty."

11 A. I believe that I have read that.

12 Q. And that just before those treaties
13 were made, in fact the Indians had burned down a mining
14 camp and kicked the miners out and that got the
15 government into action.

16 Further on treaties, sir, at page 7475
17 and continuing over to 7476, you are saying that the
18 treaty areas represent traditional native boundaries.

19 A. 7475, I am sorry?

20 Q. Yes, page 7475.

21 A. Is that in another volume?

22 Q. No, I am still looking at volume --
23 excuse me, the transcript for the date September 7th
24 1988.

25 A. 74...

1 Q. 7475. If you would look towards the
2 bottom of that page.

3 A. Yes.

4 Q. Your evidence there, and without
5 reading it to you, are you there saying that the
6 boundaries of the treaties represented traditional
7 native boundaries?

8 A. That is my understanding, yes.

9 Q. Now, to be fair sir, you said you are
10 not a historian. My question now is: Are you trained
11 as an anthropologist?

12 A. No, sir, I am not.

13 Q. Okay. From where do you gain this
14 understanding?

15 A. Discussions that I have had with
16 people who are anthropologists.

17 Q. And none of them have suggested to
18 you that the treaty boundaries are only where they are
19 because the Europeans didn't have good maps and all
20 they could do was refer to watersheds?

21 A. I never heard that suggested, no.
22 In fact, in discussions on aboriginal rights with some
23 native groups, I have had discussions where it was
24 stated that the watershed did demark the traditional
25 area. The traditional hunting grounds generally

1 followed watershed areas.

2 Q. At the top of page 7476, I want to
3 read a little bit from your evidence because I would
4 like you to clarify. I will start partway along line
5 2. Those words: "Reserved for them for their hunting
6 grounds", today are given a rather expansive
7 definition.

8 A. Yes.

9 Q. And then it is sort of dropped. What
10 did you mean by that?

11 A. That to the extent that the Royal
12 Proclamation is quoted today, the activities which
13 might be permitted or that might be elements of
14 aboriginal rights might include more than hunting.

15 Q. Might include more than hunting?

16 A. Yes. The word hunting grounds today,
17 I am suggesting, are to be given a more expansive
18 definition; that is to say, that that area is an area
19 which might include fishing, for example.

20 Q. Well, don't you agree that the word
21 hunt and hunting in the 19th and 18th Centuries
22 referred to just the general pursuit of game?

23 A. And fish as well?

24 Q. And fish, yes. The hunt is a phrase
25 that appears always, for instance, in Hudson Bay

1 records. The hunt means going out and somehow or other
2 catching something wild.

3 A. Well, I have certainly been involved
4 in discussions which considered whether or not trapping
5 was to be considered a form of hunting and a fairly
6 lively debate on the subject. I don't think that
7 fishing would necessarily be included in that.

8 I am suggesting that at least from
9 today's meaning of those words that a more expansive
10 definition may be implied -- might be attributed to the
11 words of the Royal Proclamation.

12 Q. Let's go back for a moment to why the
13 treaty boundaries appear where they are. Do you agree
14 that, generally speaking, treaties were entered into
15 when the land and resources was wanted by the Europeans
16 and if it wasn't wanted at any given time, there was no
17 treaty?

18 A. I think that is a fair assumption.

19 Q. And that would be the reason why we
20 just practically today have a treaty in the far north,
21 because now in the late 20th Century the Europeans
22 finally they really need it and so a treaty is being
23 made?

24 A. In the far north?

25 Q. Yes.

1 A. Northwest Territories?

2 Q. Yes.

3 A. I think that is probably a fair
4 assumption.

5 Q. And in those areas such as British
6 Columbia where the Indians learned the value of their
7 land before the treaty makers came along, there were no
8 treaties?

9 In British Columbia, the Gold Rush
10 preceded the treaty-making attempts and, therefore, the
11 Indians wouldn't sign?

12 A. I am not really familiar with that
13 situation.

14 Q. Now, sir, treaties do contain
15 surrender language and at page 7482 you read into the
16 record the words of surrender or cession from one of
17 the treaties and I will just read them now. They are
18 very brief:

19 "Said Indians do hereby cede, release,
20 surrender and yield up to the Crown all
21 their rights, titles and privileges
22 whatsoever to the lands."

23 My question to you, sir, is: Have you
24 studied any native language?

25 A. No, I have not.

1 Q. Do you know whether those passages
2 can be translated into, for example, Ojibway or Cree?

3 A. I don't know.

4 Q. You, as a lawyer, have no trouble
5 understanding that at all, I take it?

6 A. The literal --

7 Q. The literal meaning is very clear, I
8 suggest to you?

9 A. I think it is, yes.

10 Q. Yes. I have gone forward now, sir,
11 and I would ask you to go forward to page 7490,
12 beginning at line 15. You are referring to the fact
13 that the Migratory Birds Convention Act and the Ontario
14 Fisheries Act and the regulations are all federally
15 enacted laws?

16 A. That's correct.

17 Q. And you had in your written materials
18 and in your oral evidence explained that treaty
19 rights -- prior to Section 35 of the Constitution Act
20 coming into force, treaty rights were subject to
21 federal legislation; is that right?

22 A. Yes.

23 Q. Okay. So these two statutes being
24 federal were superior to treaty rights?

25 A. If there is a conflict between either

1 of those pieces of legislation and terms of a treaty,
2 the federal legislation prevailed.

3 Q. All right. But if either of these
4 were a provincial statute for any reason, that would
5 not be the case, then the treaty right would prevail;
6 is that correct?

7 A. If there is a conflict between -- a
8 direct conflict between the two, yes. Section 88 says
9 subject to the terms of treaty.

10 Q. Now, would you agree with me, sir,
11 that the Ontario Fishery Regulations are, for all
12 practical purposes, made by officials of the Government
13 of Ontario, not enacted but drawn?

14 A. Perhaps in draft form, but then they
15 are submitted to the federal government and then
16 sometimes the federal government does make amendments
17 before they are enacted by the federal government.

18 Q. Would you agree that most of the few
19 observers of the process would find very little
20 participation by federal officials in that process?

21 A. No.

22 Q. Well, I included the word few because
23 I don't think there is a lot of literature on this
24 rather obscure area of public administration, but I did
25 find one recent publication.

1 I showed this to Mr. Kenrick yesterday
2 and he said he didn't recognize it. It is Rising to
3 the Challenge, a publication of the Canadian Wildlife
4 Federation. Are you familiar with it?

5 A. I have looked at the chapter on
6 treaty or Indian fishing rights or native fishing
7 rights, yes.

8 Q. Okay.

9 MR. COLBORNE: Mr. Chairman, I want to
10 ask this witness a few questions about the document, I
11 suggest that it is sufficiently identified.

12 THE CHAIRMAN: Do you have copies of
13 either the document or the excerpts that you are going
14 to be referring to?

15 MR. COLBORNE: Yes. (handed)

16 THE CHAIRMAN: Very well.

17 MR. COLBORNE: Probably not enough. The
18 document is entitled Rising to the Challenge.

19 THE CHAIRMAN: Mark that as Exhibit 226.

20 ---EXHIBIT NO. 226: Photocopy of a document entitled:
21 Rising to the Challenge,
22 publication of the Canadian
Wildlife Federation.

23 THE CHAIRMAN: Mr. Colborne, do you have
24 the date that this was published, our sheet does not
25 have that?

1 MR. COLBORNE: I apologize, it should
2 have. For some reason the date was left out, possibly
3 because it is on the inside of the cover page.
4 Copyright, 1988. This independent report has been
5 published by the Canadian Wildlife Federation.

6 THE CHAIRMAN: Thank you.

7 MR. COLBORNE: I have filed and provided
8 to the witness chapters 1, 2, 3, 4 -- excuse me for
9 just a moment, Mr. Chairman.

10 Excuse me, that would be 1, 3, 4 and 6.

11 THE CHAIRMAN: Thank you.

12 MR. COLBORNE: Q. Sir, partway
13 through -- I don't know how the pages show up--

14 MR. CRYSTAL: A. Yes.

15 Q. --in your copy, but I want to look at
16 Chapter 4, titled: Governing the Fisheries.

17 MR. FREIDIN: What page is that in the
18 exhibit?

19 MR. CRYSTAL: I am sorry, chapter...

20 MR. COLBORNE: Q. Page 37.

21 MR. CRYSTAL: A. Yes.

22 Q. The fourth line of text, of main body
23 text on that page reads as follows:

24 "Fisheries management in Canada difficult
25 to unravel, let alone explain in a few

1 pages, falls short of all the above."

2 And he is referring to certain items that
3 have to do with management in government.

4 A. Yes.

5 Q. My question to you is: Do you agree
6 that fisheries management in Canada is difficult to
7 unravel, let alone explain in a few pages, or do you
8 know?

9 A. That is basically a very evaluated
10 statement, so the question of whether or not -- I
11 suppose there are many different sets of regulations
12 involved in Canada, and so I suppose for that reason
13 one might say it is difficult to unravel.

14 Q. Okay. I want you to look a little
15 further down the page and this would be in the fourth
16 line of text in the second paragraph of the main body.
17 It says:

18 "Indeed, the inland fisheries may be one
19 of our most complex cases of divided
20 jurisdiction."

21 A. Yes.

22 Q. Now, you have just said: Well, there
23 may be a lot of regulations and so on. But do you
24 agree with this: There is also a very complex divided
25 jurisdiction aspect to the governing of fisheries?

1 A. No more complex than the divided
2 jurisdictional question in respect of native issues.

3 Q. Well, sir, we don't have any evidence
4 that I know of on how--

5 A. Yes I....

6 Q. --complex that may or may not be.

7 A. I would agree that because of the --
8 there is a very similar sort of split in jurisdiction
9 in respect of fisheries, in respect of the proprietary
10 interest in the fisheries and power to make regulations
11 in respect to the fisheries between the provincial and
12 federal governments and that does make management of
13 fisheries in Canada a complex issue, yes.

14 Q. But you are a lawyer so you know of
15 cases of divided jurisdiction, that is one of the
16 general areas in which we lawyers are trained.

17 So my question once again is: Do you
18 agree that inland fisheries may be one of our most
19 complex cases of divided jurisdiction?

20 A. Well, I must say that my experience
21 as a lawyer, issues of divided jurisdictions that I
22 have come across have generally -- personal experience
23 in have generally only been in respect of fisheries and
24 native issues.

25 So I would suggest to you that the

1 fisheries issue is no more complex as a question of
2 divided jurisdiction than the native issues matters
3 are. They are both complex.

4 Q. Okay. So you are not in a position
5 to agree or disagree with Professor Pierce, the author
6 of this book, because you don't have general
7 familiarity with the other cases of divided
8 jurisdiction; is that what I understand you to be
9 saying?

10 A. I have experience of those two and I
11 think that I have considerable experience in respect of
12 those two. I have never been involved in any
13 litigation, any other -- I suppose in law school I have
14 studied cases of divided jurisdiction.

15 Q. Well, let me just take one last shot
16 at it.

17 THE CHAIRMAN: Mr. Colborne, does it make
18 much difference whether this is the most complex, very
19 complex, complex or the least complex?

20 I mean, the point is that the witness has
21 indicated that he feels it is complex. It may be no
22 more complex in his own experience than dealing with
23 native issues, but whether it is more complex than
24 divided jurisdiction with respect to other areas, how
25 is that necessarily relevant to what we are dealing

1 with here?

2 MR. COLBORNE: Well, I agree with your
3 question to the extent that it is not relevant whether
4 it is most complex or a little less complex or medium
5 complex. I was trying to find out if this witness
6 would give me a straight answer to whether he agreed or
7 disagreed with the statement. And...

8 THE CHAIRMAN: Well, he is saying he
9 agrees with the statement within the realm of his
10 experience and with the two areas that he is familiar
11 with, one is no more complex than the other. I mean,
12 that appears to be his answer.

13 MR. COLBORNE: Well, Mr. Chairman, maybe
14 I didn't hear him say that he agreed that it was
15 complex. All I heard him say--

16 MR. CRYSTAL: I agreed with that.

17 MR. COLBORNE: --that he agreed that it
18 was no more complex than this other one.

19 THE CHAIRMAN: I think the record will
20 show he also agreed it was complex.

21 MR. FREIDIN: He just finished saying
22 that those two are equally complex.

23 MR. COLBORNE: But equally complex can
24 mean equally not complex.

25 THE CHAIRMAN: Well, with respect, Mr.

1 Freidin, I heard him say --

2 MR. CRYSTAL: I said that they were both
3 complex. I think I said that they are both complex.

4 MR. COLBORNE: I apologize then, Mr.
5 Chairman. If the witness indeed said that, and I
6 accept that he did, I must have misheard because I
7 would have been satisfied with that.

8 THE CHAIRMAN: Very well.

9 MR. COLBORNE: Q. Could you go forward
10 just a light bit in the book, sir, then to page 44 and
11 there you will find a chart at the top of the page.

12 MR. CRYSTAL: A. Yes.

13 Q. And there is a line in that chart for
14 the Province of Ontario.

15 MR. FREIDIN: Unfortunately by
16 highlighting it you made it impossible to read.

17 MR. COLBORNE: Well, I can only afford
18 one copy. I am sure that the Province of Ontario could
19 get one.

20 MR. FREIDIN: I just want to follow the
21 evidence.

22 THE CHAIRMAN: Well, gentlemen, let's not
23 quibble over nonsense. If there is some line you
24 specifically cannot read, Mr. Freidin, please just
25 repeat it from the original, Mr. Colborne, the words

1 for the line.

2 MR. COLBORNE: Q. Under the heading
3 Government Having Administered a Responsibility, this
4 would be the second column, do you see the word
5 provincial next to Ontario?

6 MR. CRYSTAL: A. Yes.

7 Q. Moving to the right, under the column
8 heading Nature of Delegated Responsibility for the
9 Ontario line, do you see the words: province manages
10 fresh water fisheries, habitat and hatcheries?

11 A. They are difficult to read but, yes,
12 I can make that out.

13 Q. Yes. Well, I am sorry that--

14 A. It is okay.

15 Q. --it didn't photocopy well.

16 But if you had been the one to author
17 that chart, would you have used essentially a similar
18 language to describe the same situation in Ontario?

19 A. In the far -- the province manages --
20 what does it say, fresh water fisheries...?

21 Q. Habitat and hatcheries?

22 A. Yes, I would agree with that that the
23 province manages that. Now, government having
24 administrative responsibility, provincial, yes, I would
25 agree with that as well.

1 Q. Let's go to page 45 and this will be
2 my last question about this chapter. There is a
3 heading there Fisheries Management Arrangements?

4 A. Yes.

5 Q. I would like to read to you the first
6 part of the paragraph that begins at that heading:

7 "Although the federal government
8 retains legislative power over fisheries
9 throughout Canada, arrangements with
10 provincial and territorial governments
11 enable them to administer inland
12 fisheries. By this, means provinces and
13 territories have been delegated
14 responsibility for such things as
15 licensing commercial and recreational
16 fishing, allocating available catches
17 and enforcing regulations enacted under
18 the Fisheries Act."

19 I am going to skip forward one sentence
20 and only read you part of the last sentence and this is
21 the part I want to emphasize.

22 A. Yes.

23 Q. "In Ontario, provincial governments
24 exercise the full range of mangement
25 responsibilities."

1 A. Yes.

2 Q. Do you agree?

3 A. The full range seems to suggest that
4 the federal government has no role whatsoever and I
5 don't think that's accurate.

6 Q. Well, tell me exactly, as far as you
7 know, what the federal government's role is in managing
8 the fisheries?

9 A. Well, unfortunately I can't tell you
10 exactly, but I can tell you that it has been my
11 experience that I have had dealings with federal
12 officials in Ontario who are involved in research in
13 Ontario and who are involved in the development of
14 policy which has application in Ontario.

15 Q. Would you agree with me though, that
16 most of the policy is developed within the Government
17 of Ontario without direct on-going participation by
18 officials of the Government of Canada?

19 MR. FREIDIN: Mr. Chairman, I am just
20 wondering whether the witness is qualified to be
21 answering questions on this particular aspect of
22 fisheries. I didn't qualify him as an expert to
23 testify on this type of legal question in terms of the
24 relationship in terms of making these sorts of
25 decisions.

1 THE CHAIRMAN: Well, whether he is
2 qualified or not would go to the weight that might be
3 attached to his opinion. Whether or not he can answer
4 the question would be whether or not he feels he can
5 answer it.

6 Mr. Crystal?

7 MR. CRYSTAL: Could you repeat the
8 question, again?

9 MR. COLBORNE: No, I can't. I wonder if
10 I could consult with the reporter.

11 THE CHAIRMAN: Could you just read back
12 the last question posed by Mr. Colborne, please.
13 ---Discussion off the record

14 MR. CAMPBELL: I don't think that any of
15 this is going on the record.

16 THE CHAIRMAN: Oh. Did you find the
17 question?

18 THE REPORTER: Yes.

19 THE CHAIRMAN: Okay.

20 THE REPORTER: "Q. Would you agree with
21 me though that most of the policy is
22 developed within the Government of
23 Ontario without direct on-going
24 participation by officials of the
25 Government of Canada?"

1 THE CHAIRMAN: Close.

2 MR. CRYSTAL: Yes, I think that was a
3 pretty good rendition, Mr. Chairman.

4 And I think that my answer that I gave -
5 it didn't get on the record, maybe I should -- was that
6 I do know that there is considerable policy work done
7 at the provincial level; I know that there is some
8 policy work done at the federal level; I know that
9 there is some consultation between the province and the
10 federal government.

11 The extent of that consultation, I am
12 not -- I don't think I'm qualified to comment on.

13 MR. COLBORNE: Q. Do you agree that is
14 an issue between at least some treaty Indians and
15 Ontario that Ontario achieves indirectly by, in effect,
16 drafting federal regulations that it could not achieve
17 directly and that is, by legislating itself, via the
18 process that we have just discussed.

19 Ontario couldn't just legislate and
20 abrogate fishing rights but instead Ontario drafts
21 regulations which are then made federal regulations
22 and, therefore, indirectly achieves the result,
23 possibly not the intended result, but I am not--

24 A. I think --

25 Q. --questioning bona fides here, but

1 achieves the result of accomplishing what it could not
2 do directly.

3 A. I think there is case law that makes
4 it clear that those Ontario fishery regulations are
5 indeed federal regulations and there can be no doubt
6 about that.

7 Q. No doubt about that. I am asking
8 you: Is this not an issue that at least some status
9 Indians say that Ontario achieves indirectly by doing
10 this what it could not achieve directly by legislating
11 itself?

12 A. If you are asking me whether or not I
13 have heard counsel, in particular, on behalf of native
14 people make that argument to me, I have.

15 Q. Do you agree that historians say that
16 provincial governments were not given jurisdiction over
17 Indians because essentially they were too narrow minded
18 and preoccupied with settlers' interests and the
19 property and so on, whereas the federal government
20 would have the broad interests of the Brithish Empire
21 at heart at that time?

22 A. No, I have never heard that, I have
23 not. I have heard that the reason that that
24 responsibility was given to the federal government was
25 for purposes of uniform application.

1 Q. Where did you hear that?

2 A. I can't recall.

3 Q. Is that something you have read in
4 something that--

5 A. I believe it is something that I have
6 read.

7 Q. In a reputable published source?

8 A. I would believe that it was, yes, but
9 I can't recall.

10 THE CHAIRMAN: Probably the Canadian Bar
11 Review.

12 MR. COLBORNE: I doubt it, that's -- no,
13 actually, yes, you can send almost anything to them.

14 THE CHAIRMAN: We will go on.

15 MR. FREIDIN: Do you want to withdraw
16 the exhibit?

17 MR. COLBORNE: Oh, the Canadian Bar
18 Review, yes.

19 Q. Sir, at page 7479 towards the bottom
20 you have presented some evidence concerning the recent
21 case law, the Sparrow case, the Aggawa case.

22 MR. CRYSTAL: A. Yes.

23 Q. Are you following me?

24 A. Page 7479?

25 Q. 7497, I am sorry.

1 A. Okay, yes.

2 Q. I have simply a question about the
3 Aggawa case which is one of the ones that you referred
4 to, this very recent decision of the Ontario Court of
5 Appeal.

6 A. Yes, mm-hmm.

7 Q. Would you agree with me that no cases
8 yet have had evidence - I am trying to tie this to the
9 transcript, excuse me - have had evidence relating to
10 "the rationale of conservation of the resource"?

11 That's from line 24 of the page I referred you to.

12 That is a kind of a convoluted question.
13 Why don't I --

14 A. If I can rephrase it, I think I
15 understand what you are getting at. You are asking me
16 if in any -- first of all, I can really only comment
17 for Ontario, because I really am not aware of other
18 jurisdictions.

19 But if you are asking me if in Ontario
20 there have been any cases where evidence has been led
21 as to whether or not the legislation is required for
22 conservation purposes, I can tell you that I am not
23 aware of such cases but, because there has not, up
24 until very recently, been a requirement to provide that
25 evidence.

1 Q. Yes. Do you think that as a result
2 of the Aggawa case that's sort of the next step if this
3 issue must be resolved by litigation?

4 A. Do I think that in the future that
5 the Crown will be leading evidence on that issue,
6 whether or not --

7 Q. Yes.

8 A. I think that it very well may.

9 Q. On page 7499, sir, you referred to at
10 page -- excuse me, at line 9, the so-called leniency
11 policy?

12 A. Yes.

13 Q. And then the word leniency appears
14 again and again in the evidence that follows?

15 A. Yes.

16 Q. You use the phrase so-called?

17 A. Yes.

18 Q. Who calls it a leniency policy?

19 A. I think many people do. Conservation
20 officers do, Ministry staff do, I have heard Indian
21 people refer to it by those words.

22 The document that that appears in is not
23 entitled "leniency guidelines" or "leniency policy",
24 that is why I think I used the word so-called.

25 Q. I am somewhat surprised that you have

1 heard Indians refer to it as a leniency policy. Is
2 that something you have heard frequently?

3 A. I think fairly frequently.

4 Q. Isn't it true that those guidelines
5 were first produced to give your Ministry's officers
6 some guidance on the law, when to lay charges and when
7 not to; was that not the original purpose?

8 A. I think that that's fair and when
9 they ought to exercise leniency.

10 Q. Well, those guidelines are pretty
11 lengthy, right? I have a copy of the 1979 version
12 here.

13 A. Yes.

14 Q. And I don't think they are paged, but
15 they are -- this is quite a lengthy and somewhat bulky
16 document, even though it is in point form. Would you
17 agree?

18 A. It would appear to be -- the document
19 that you handed me appears to be 13 pages long.

20 MR. COLBORNE: I would like this marked
21 as an exhibit, Mr. Chairman. You can refer to it as
22 the so-called leniency guidelines.

23 THE CHAIRMAN: Is that what it is
24 entitled?

25 MR. CRYSTAL: No.

1 MR. COLBORNE: No. It is dated May 10th,
2 1979, and it is titled under the subject --

3 MR. CRYSTAL: I think that there is a
4 memorandum attached to the guidelines, but the
5 guidelines are referred to on, I think, the third page,
6 Guidelines re: Treaty Indians and the Enforcement of
7 the Fisheries Act and Ontario Fishery Regulations and
8 Migratory Birds Convention Act and Regulations.

9 THE CHAIRMAN: Exhibit 227.

10 ---EXHIBIT NO. 227: 13-page guideline document dated
11 May 10th, 1979.

12 MR. COLBORNE: Q. There is some
13 reference in there to leniency I agree.

14 MR. CRYSTAL: A. Yes.

15 Q. If you have it feel free to refer me,
16 but that's not really the point I was going to get at.

17 Don't you agree that the vast majority of
18 the text of this document is not taken up with any
19 discussion of leniency, but is taken up with when
20 charges should be laid and when they shouldn't be laid
21 bearing in mind treaty rights and that type of thing?

22 A. Well, I agree that there is -- in
23 each section there is only one paragraph that talks
24 about leniency, it uses the words leniency.

25 I have also -- I have heard them referred

1 to as native enforcement guidelines, so I suppose it is
2 fair to say that they are guidelines as to when
3 wildlife and fish legislation ought to be enforced and
4 when it ought not to be enforced, and when leniency
5 ought to be exercised.

6 Q. At page 7502, I want to read from
7 your evidence beginning toward the end of line 12:

8 "To some extent, this leniency policy was
9 intended as an interim measure until
10 there could be some agreement on the
11 issue."

12 A. Yes.

13 Q. My question to you is, sir: Have you
14 studied the internal files of MNR because I believe
15 that 1979 is before your time?

16 A. Yes.

17 Q. Have you personally satisfied
18 yourself that that was--

19 A. I have reviewed the files.

20 Q. --to some extent --

21 A. I have reviewed the files concerning
22 this issue from time to time for various different
23 reasons.

24 Q. The question --

25 A. And I have also had a personal

1 conversation with the person who is responsible for the
2 drafting of this material and that's what he advised
3 me.

4 Q. Okay. And so you are satisfied that
5 to some extent the policy was intended as an interim
6 measure until there could be some agreement on the
7 issue?

8 A. Yes.

9 Q. That was part of it. Now, you say
10 that you looked at the files and you conferred with an
11 individual who was involved.

12 Is your last answer from what that
13 individual told you or is it from the files or is from
14 both?

15 A. From what the individual told me.

16 Q. You have never seen anything in
17 reviewing the files confirming that one of the --
18 excuse me, that to some extent the policy was intended
19 as an interim measure, et cetera, et cetera?

20 A. My recollection is based on the
21 personal conversation.

22 Q. Now, sir, yesterday, when I wanted to
23 clarify your curriculum vitae but we got sidetracked on
24 a few tangents, some topics were discussed and I think
25 the first one, although this arose in Mr. Kenrick's

1 evidence, the first one had to do with minerals.

2 A. Yes.

3 Q. Whether it was the position of
4 Ontario that it owned the minerals under Indian
5 reserves.

6 I want to show you a letter and ask you
7 if you have familiarity with this document. Really
8 just the last paragraph of that if that assists you,
9 sir.

10 A. I am not familiar with this letter,
11 no.

12 MR. COLBORNE: Mr. Chairman, in light of
13 the evidence yesterday, I thought that perhaps the
14 witness would be familiar with the document, but I can
15 save it for my case.

16 THE CHAIRMAN: Very well.

17 MR. COLBORNE: Q. Another topic that
18 arose was the question of the negotiations or lack
19 thereof concerning fishing, and you objected to me
20 characterizing your evidence as your version.

21 I want to show you what I hope you will
22 agree is a version by a source other than you or I. I
23 am showing you a document. (handed)

24 MR. CRYSTAL: A. Yes.

25 Q. You are familiar with that?

1 A. Yes.

2 Q. That is a report dated -- well, for
3 the period ended February 29th, 1988, by the Indian
4 Commission of Ontario; is that correct?

5 A. Yes.

6 MR. COLBORNE: Mr. Chairman, I have a bit
7 of a problem with my paper work here. I don't know if
8 you were contemplating a recess, but I have very few
9 further questions for this witness. I can either stand
10 here and readjust my paper or ask you for a brief
11 recess.

12 THE CHAIRMAN: Well, when you say very
13 few further questions, about how much longer would you
14 estimate you would take?

15 MR. COLBORNE: Under one half hour for
16 sure.

17 THE CHAIRMAN: I think in view of the
18 fact we have gone an hour and half I would like to give
19 the reporters a break at this time, so we will take a
20 20-minute break.

21 MR. COLBORNE: Thank you.

22 THE CHAIRMAN: Thank you.

23 ---Recess taken at 3:30 p.m.

24 ---Upon resuming at 4:00 p.m.

25 THE CHAIRMAN: Thank you. Be seated,

1 please.

2 MR. COLBORNE: Mr. Chairman, before the
3 break, I indicated that I was succumbing paper for some
4 other counsel here. I want to switch the order just a
5 little bit now so that the exhibits are all in order.

6 I presented the witness with a document.
7 If you don't mind, sir, I would like to sort of leave
8 that before him but switch to another topic so the
9 sequence makes a little more sense.

10 THE CHAIRMAN: Is that one going to come
11 in eventually?

12 MR. COLBORNE: It is, yes.

13 THE CHAIRMAN: Okay.

14 MR. CRYSTAL: Mr. Chairman, I should also
15 say that I am prepared to make a few comments about the
16 Royal Proclamation now so that we could -- I remember
17 he said -- it was suggested that I have the opportunity
18 to look at the Royal Proclamation once again.

19 THE CHAIRMAN: In answer to the questions
20 specifically posed?

21 MR. CRYSTAL: Yes, yes.

22 THE CHAIRMAN: Well, do you want to have
23 that done right now or do you want to just continue on
24 and have it done at the end of your presentation?

25 MR. COLBORNE: I would sooner have it

1 done at the end because otherwise we will have two
2 things intruding into the sequence instead of just one.

3 THE CHAIRMAN: All right. We will wait
4 until the end of Mr. Colborne's presentation.

5 MR. COLBORNE: The one item that I want
6 to include in, so that the exhibits will be in order,
7 is this one.

8 Q. Mr. Crystal, do you agree that the
9 guidelines that are filed as Exhibit No. 227 were
10 updated in 1986?

11 MR. CRYSTAL: A. Yes.

12 Q. Well, does what I have just shown you
13 appear to be a copy of the updated guidelines?

14 A. Okay. If I could make a comment
15 about that. In this updated version there are certain
16 annotations which are added and they are underlined.
17 Those annotations are intended to be explicatory
18 although the guidelines themselves, apart from those
19 parts that are underlined, haven't changed.

20 MR. COLBORNE: May this be entered, Mr.
21 Chairman, I believe it will be Exhibit 228.

22 THE CHAIRMAN: Very well. Exhibit 228
23 will be the Updated Guidelines.

24 ---EXHIBIT NO. 228: Updated Guidelines.

25 MR. COLBORNE: I thought it would be a

1 good idea, Mr. Chairman, to have these two following
2 one after the other.

3 Q. If I understand you correctly, Mr.
4 Crystal, you have just said that the underlined, the
5 capitalized and underlined portions of this document
6 are added to the original document?

7 A. Yes.

8 Q. Is that the only change?

9 A. That is my belief, yes.

10 Q. You said earlier that there was one
11 paragraph in each section of the original document that
12 referred to leniency?

13 A. Yes.

14 Q. So I suppose there is one paragraph
15 in each section of this document that refers to
16 leniency?

17 A. It may not be in every section. I
18 think only only in those sections which refer to
19 federal legislation because, as I stated in my
20 evidence-in-chief, where provincial legislation governs
21 it is not a matter of leniency but rather it is a
22 matter of the non-application of that legislation to
23 Indian people.

24 THE CHAIRMAN: Mr. Crystal, in Exhibit
25 227 that was filed earlier is the words leniency used

1 in other than, I believe it is - if I recall from
2 looking at it briefly - paragraph 6?

3 MR. COLBORNE: It would also be paragraph
4 6 in Exhibit 228, Mr. Chairman.

5 THE CHAIRMAN: Take a look at the top of
6 the page where it is numbered 6.

7 MR. FREIDIN: Mr. Chairman, I have
8 neither a copy of either of those two exhibits. Where
9 are we referring, paragraph 6?

10 THE CHAIRMAN: I am referring to
11 paragraph 6 of Exhibit 227 where it seems to refer to:
12 "Conservation officer should exercise leniency when
13 dealing with treaty Indians."

14 MR. CRYSTAL: Yes, that is the section
15 that deals with federal legislation, so that is the
16 only place.

17 THE CHAIRMAN: That is the only place in
18 this one?

19 MR. CRYSTAL: I think so.

20 THE CHAIRMAN: And there is a
21 corresponding section, I suppose, in 228; is that
22 correct?

23 MR. CRYSTAL: It is paragraph 6 in the
24 first section. I was under the impression that there
25 might have been more than one section dealing with

1 federal legislation, but it appears I was mistaken
2 about that.

3 MR. COLBORNE: Q. Now, Mr. Crystal, just
4 so I can complete my dealings with you today on the
5 hunting side of things so that the exhibits are in
6 order, I want to show you another document and I am
7 asking you to tell me if you are familiar with that
8 one. (handed)

9 MR. CRYSTAL: A. No, I am not.

10 MR. COLBORNE: Mr. Chairman, I request
11 that you exercise your discretion and permit me to file
12 this now, subject to further identification, for the
13 very simple reason that it will make the record more
14 sensible.

15 I want to have general documents
16 identifying the matters in issue in respect of hunting
17 filed in order and addressed in order. So if we end up
18 filing it some time down the line it won't be -- I will
19 identify what it is.

20 THE CHAIRMAN: Mr. Freidin, subject to
21 further identification and proof, do you have any
22 objection to it going in now?

23 MR. FREIDIN: No, subject to that, that
24 is fine.

25 THE CHAIRMAN: Very well, Exhibit 229.

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1 grips with is if and how the hunting of migratory birds
2 is a traditional activity throughout various portions
3 of the province, and whether or not that traditional
4 activity ought to be recognized -- recognized in some
5 ways.

6 I think it is clear that it is viewed by
7 the Ministry to be a traditional activity in some
8 portions of the province and there is some question in
9 other portions.

10 Q. Oh, you are referring to your own
11 Ministry?

12 A. Yes.

13 Q. So your Ministry, if I understand you
14 correctly, is taking the position that in some parts of
15 the province you require to be satisfied that native
16 migratory bird hunting is in fact a traditional
17 activity?

18 A. I said that in some cases it is clear
19 that it is and in other cases it's less clear.

20 Q. Okay. Now the paragraph that I have
21 referred--

22 A. Yes.

23 Q. --you to identifies a number of
24 problems.

25 A. Yes.

1 Q. First of all, divergent viewpoints of
2 various parties?

3 A. Yes.

4 Q. Second of all, the necessity of
5 participation by the Government of the United States of
6 America?

7 A. Yes.

8 Q. Thirdly, the political reality that
9 the provincial governments cannot be alienated?

10 A. Yes.

11 Q. That would include the Province of
12 Ontario?

13 A. Yes.

14 Q. Can you tell me, from the point of
15 view of the Province of Ontario, what the federal
16 government might do to assure that the Indian treaty
17 hunting rights are honoured that would alienate you and
18 the Province of Ontario?

19 A. What they might do. I suppose that
20 they could -- I think it would alienate the Province of
21 Ontario if they chose to in some way change the scheme
22 without carefully consulting the province.

23 Q. And the last sentence there:

24 "The provincial and territorial
25 governments are partners with the federal

1 government in the conservation of
2 migratory birds."

3 Do you agree with that characterization?

4 A. Yes.

5 Q. So insofar as migratory birds are
6 concerned, the problem facing Indians in terms of
7 getting their rights under treaties recognized at least
8 include, first of all -- possibly among others, firstly
9 the one you mentioned that Ontario would not be
10 satisfied with this traditional activity in areas;
11 secondly, simply divergent points of view from various
12 parties involved; thirdly, the necessity of obtaining
13 agreement with the Government of the United States and,
14 finally, the necessity of obtaining agreement from all
15 interested provincial governments as well as federal
16 government?

17 A. Yes.

18 Q. Would you agree that that is a bit of
19 an uphill battle?

20 A. I don't think it is one that is
21 insurmountable. I have been involved in discussions on
22 this issue fairly recently and it is my sincere hope
23 that we will be able to come to some resolution.

24 Q. May I suggest that the previous
25 generation of people in approximately the same position

1 as you were also involved in those discussions and they
2 were possibly also optimistic but they couldn't get
3 anywhere either.

4 A. I can't speak to that.

5 THE CHAIRMAN: Mr. Colborne, just for the
6 record, Mr. Martel advises that to the best of his
7 knowledge he is unrelated to the author of this letter.

8 MR. COLBORNE: Thank you.

9 Q. Now, Mr. Crystal, just before the
10 break, I had placed before you a document of the Indian
11 Commission of Ontario but during the break I realize
12 that there was some hunting matters that I wanted to
13 include dealing with and I have now done that.

14 A. Yes.

15 Q. So the document I have referred to
16 has to do with fishing.

17 A. Which document is that? That is the
18 report of the Commission?

19 Q. Yes.

20 A. Yes.

21 MR. COLBORNE: And I would like to ask
22 that it be marked as an exhibit.

23 THE CHAIRMAN: Exhibit 230.

24 MR. COLBORNE: (handed)

25 ---EXHIBIT NO. 230: Report of the Indian Commission of

1 Ontario.

2 MR. COLBORNE: I have provided a
3 photocopy of only one section of this report and, as
4 well, the table of contents so one can see what else is
5 included in the report.

6 One section is the section having to do
7 with fishing and, Mr. Crystal, I had prefaced an
8 earlier question by saying that yesterday you objected
9 to my characterizing your evidence as being your
10 version of what was going on in this issue, and I am
11 bringing that forward as somebody else's version of
12 what is going on. I think you have had a chance to
13 look at it.

14 A. Yes.

15 Q. Do you agree that this correctly sets
16 out what has been happening with the Grand Council
17 Treaty No. 3 Nation fishing negotiations up to its
18 date?

19 A. Well, I really haven't had an
20 opportunity to review it recently. You know, I haven't
21 had a chance to review these pages in detail at this
22 time.

23 Q. Well, let's just go through it point
24 by point then.

25 A. Okay.

1 Q. There really are only two pages of
2 type described here.

3 A. Okay.

4 Q. Or slightly more.

5 A. Okay.

6 Q. Under the heading Commencement, this
7 is towards the bottom of page No. 24, it says:

8 "Grand Council Treaty No. 3 Nation began
9 negotiations with Ontario and Canada on
10 April 16th, 1986 and tabled its position
11 on August 13th, 1986, at Minaki Ontario."
12 Is that correct?

13 A. I believe that is correct, yes.

14 Q. When it says tabled its position --

15 THE CHAIRMAN: Mr. Cassidy, excuse me, do
16 you want to borrow one of our copies?

17 MR. CASSIDY: Thank you.

18 MR. COLBORNE: Mr. Chairman, I think I
19 have been uselessly putting one on the registrar's
20 table.

21 THE CHAIRMAN: Yes, I do not think you
22 need it over there.

23 MR. COLBORNE: You are probably
24 collecting two for the record.

25 THE CHAIRMAN: Right.

1 MR. COLBORNE: (handed)

2 Q. We have just referred to its
3 position. Would you agree that I have just furnished
4 you with a copy of Treaty 3's position that was tabled
5 on that occasion?

6 MR. CRYSTAL: A. I have seen this
7 booklet with this cover before, although I haven't
8 looked in it I know that that is --

9 Q. Look in it and see if you can find
10 anything that would suggest to you that I have provided
11 you with anything other than what I have just provided
12 you with.

13 A. I am not suggesting that, Mr.
14 Colborne.

15 MR. COLBORNE: Thank you. Could this be
16 marked.

17 THE CHAIRMAN: Exhibit 231.

18 MR. COLBORNE: (handed)

19 THE CHAIRMAN: Thank you.

20 MR. COLBORNE: I will not be asking this
21 witness anything about the contents of Exhibit 231.

22 THE CHAIRMAN: Very well.

23 ---EXHIBIT NO. 231: Booklet containing Grand Council
24 Treaty No. 3 position.

25 MR. COLBORNE: Q. Continuing with the

1 same paragraph that we were looking at, sir, right at
2 the end of it, do you agree that Ontario and Canada
3 agreed that by October 1st, 1986, each would provide
4 its views on the proposed principles tabled by Grand
5 Coucil Treaty No. 3 Nation?

6 A. I believe that is accurate.

7 Q. Continuing under the heading Progress
8 Achieved, Canada tabled its response but by letter
9 dated January 14th, 1987, the Commission was informed
10 that:

11 "Ontario was not in a position to respond
12 nor was it able to give an indication of
13 when a response might be expected pending
14 consideration of a further extension of
15 its 'public information program' relating
16 to the fishing negotiations in issue."

17 Do you agree with that?

18 A. Yes.

19 Q. Going on to page 25 and at its May
20 1st, 1987 meeting - I will skip a little bit there:

21 "Ontario stated that it would not resume
22 negotiations. Ontario was unable to
23 provide a date by which it would be in a
24 position to table its response so that
25 negotiations could resume."

1 Do you agree with that?

2 A. It seems to me that I was present at
3 a meeting where Mr. Scott, on behalf of Ontario, stated
4 that it might be a period of ten months before Ontario
5 was in a position to resume negotiations, but he didn't
6 put a fine line on that.

7 I think that was given as something of an
8 estimate. I am just working on a recollection of the
9 meeting.

10 Q. Sir, you are the official of the
11 Government of Ontario who is now in charge of these
12 negotiations or non-negotiations, whatever they may be;
13 am I not correct?

14 A. Well, for the time being that is
15 correct. I remember we were talking about other
16 personnel who are working for the Ministry of Natural
17 Resources exclusively on native issues and very
18 recently the position of officer with the outdoor
19 recreation group has been appointed to that position.

20 And I believe that to the extent when a
21 transition can be achieved, that that gentleman will be
22 conducting negotiations on fishing for the Province of
23 Ontario.

24 Q. Well, sir, are we not looking at
25 approximately two typed pages of summary of events in

1 the last two years or only slightly more?

2 A. Yes.

3 Q. And you gave the Board evidence
4 yesterday under oath as to what had transpired in
5 regard to this issue over those two years?

6 A. Yes.

7 Q. Are you now saying that you can't
8 even comment on whether this is right or wrong and you
9 seem to have some vague recollection of being at a
10 meeting?

11 A. Mr. Colborne, what I am saying is I
12 haven't had the opportunity to read this document and
13 so I am not really in a position to make that comment,
14 although I am not suggesting that it is inaccurate at
15 this time, I am just suggesting that I haven't had the
16 opportunity to review it and so it is difficult for me
17 to comment on it.

18 THE CHAIRMAN: Well, why don't we do it
19 this way, Mr. Colborne. Why don't you just take the
20 time, Mr. Crystal, right now to very quickly read these
21 two pages and then the Board would appreciate your
22 answering specifically Mr. Colborne's questions as to
23 whether you agree or disagree with whatever statement
24 he is going to put to you.

25 MR. CRYSTAL: I agree that the document

1 is accurate. I would note though that on the second
2 page where it says that the Commission cited certain
3 reasons for suspending the negotiations, I don't argue
4 with the accuracy that the Commission did cite those
5 reasons, but contained within those reasons it says:

6 "Ontario is unable or unwilling to
7 fulfill its undertaking to respond to the
8 guiding principles for negotiations
9 tabled by Grand Council in August or to
10 give a specific date by which its
11 response would be provided."

12 I would underline the or, that we were
13 unable to provide the specific date but I don't think
14 the Government of Ontario is unwilling to fulfill its
15 undertaking. I would also --

16 MR. COLBORNE: Q. Excuse me, sir, what
17 paragraph were you just reading from?

18 MR. CRYSTAL: A. On page 26, the first
19 line with the dash beside it.

20 Q. Go on.

21 THE CHAIRMAN: Could you speak up, Mr.
22 Colborne, and Mr. Crystal, please.

23 MR. CRYSTAL: Yes, I am sorry.

24 The other point that I think deserves to
25 be highlighted is that the parties are unwilling to

1 reach an accommodation of one another's position
2 sufficient to allow even preliminary discussions to
3 proceed.

4 I think it is worth noting that Ontario
5 made a proposal for those preliminary discussions and
6 it was not acceptable to Grand Council Treaty No. 3.

7 MR. COLBORNE: Q. Now, that was that the
8 Grand Council Treaty No. 3 joined a public relations
9 campaign; was it not?

10 MR. CRYSTAL: A. I don't think those are
11 the words that were used to describe it. I think it
12 was that Ontario, Canada and Grand Council Treaty No. 3
13 enter into discussions on how best to communicate with
14 the public on the issue as I think that our failure to
15 communicate effectively with the public -- all three
16 parties' failure to communicate effectively with the
17 public first time around is one of the main reasons why
18 the negotiations didn't proceed.

19 It was also part of Ontario's proposal
20 that we enter into discussions of a preliminary nature
21 with Ontario setting out its rationale for why it
22 carries on the management activities that it does and
23 for Grand Council Treaty No. 3 to present its -- why it
24 carries on -- the rationale for why it carries on with
25 the activities which it does and to just exchange those

1 views by way of preliminary discussion.

2 Grand Council Treaty No. 3 wasn't
3 prepared to enter into those discussions either. At
4 the present time, there is planned a meeting where
5 Ontario will present its rationale, although I don't
6 believe Grand Council Treaty No. 3 will do the same.

7 Q. I guess that is your version again,
8 sir. I might have to give you somebody else's version
9 again. Do you recognize that? (handed)

10 A. Yes, I am sure I have seen this
11 letter.

12 Q. Letter dated May 30th, 1988, on the
13 letterhead of the Indian Commission of Ontario
14 addressed to Grand Chief Robin Green, signed by Roberta
15 Jamieson, Commissioner.

16 THE CHAIRMAN: Exhibit 232.

17 ---EXHIBIT NO. 232: Letter dated May 30, 1988 on
18 letterhead of Indian Commission of
19 Ontario addressed to Grand Chief
Robin Green, signed by Roberta
Jamieson, Commissioner.

20 MR. CRYSTAL: Yes, I believe I have seen
21 this.

22 MR. COLBORNE: Q. Well, sir, this would
23 be during the time when you were in charge of these
24 matters, wouldn't it be, or am I wrong.

25 MR. CRYSTAL: A. Yes, yes.

1 Q. So you wouldn't have just seen this
2 letter?

3 THE CHAIRMAN: There is two letters
4 attached to this exhibit, at least the one I have.

5 MR. COLBORNE: The letter that I am
6 filing has attached to it by the writer of the filed
7 letter a copy of another letter, it is sort of an
8 enclosure.

9 THE CHAIRMAN: I see. Thank you.

10 MR. COLBORNE: Q. Now, Mr. Crystal,
11 since you said yes, I have seen this--

12 MR. CRYSTAL: A. Yes.

13 Q. --yesterday you didn't even mention
14 that the Indian Commission of Ontario had any dealings
15 with this. Now, are you prepared now to say that they
16 do?

17 A. If questioned on the point yesterday
18 I would have been happy to talk about that then as
19 well.

20 Q. So you have seen this letter?

21 A. Yes, I believe that I have. I know
22 that I have seen the second letter, it is addressed to
23 me.

24 Q. Well, I am talking about the first
25 letter.

1 A. The first letter, yes, I have seen
2 this letter.

3 Q. Now, this letter is later in time
4 than the report of the Indian Commission which was the
5 previous exhibit; is that correct?

6 A. Yes.

7 Q. Turning to the second page at the
8 top, the first sentence in the second paragraph:

9 "In its recent letters, Grand Council
10 Treaty No. 3 reaffirms its desire to get
11 on with the negotiations. Over time,
12 representatives of the Government of
13 Ontario have made it clear that before
14 Ontario is prepared to negotiate it would
15 like to be in possession of the advisory
16 committee's report and have established
17 both its internal position and, along
18 with the other parties, a joint
19 communication strategy."

20 Is that a fair statement as of this date?

21 A. Yes.

22 Q. Continuing:

23 "Unless Ontario is now willing to begin
24 the process of negotiations in an
25 alternate way, it appears that there is

1 no mutual agreement to consider their
2 reactivation at this time. If this is
3 not the case, I would like
4 representatives of Ontario to so advise."

5 What do you understand that paragraph to
6 mean? Does it mean to you that as of the date of the
7 letter the negotiations were in suspension for the
8 reasons referred in the earlier paragraph and that the
9 Commission was essentially inviting Ontario to propose
10 some way to get the negotiations re-established?

11 A. Yes.

12 Q. Now, you mentioned that Grand Council
13 Treaty No. 3 refused or declined to participate in - I
14 don't know what you call them - possibly a
15 communications strategy?

16 A. Yes.

17 Q. I call it a public relations
18 exercise.

19 A. Yes.

20 Q. Now, the attachment to this letter
21 being a letter dated May the 11th, 1988, addressed to
22 you.

23 A. Mm-hmm.

24 Q. At the end of the first paragraph
25 appears the following sentence:

1 "We continue to be of the opinion that
2 the white resistance to recognition of
3 our fishing rights came from a vocal
4 minority that should be shunned and not
5 catered to."

6 Is that your understanding of part of the
7 reason why the Grand Council Treaty No. 3 did not want
8 to participate in the exercise that you were proposing
9 as a pre-condition for negotiations?

10 A. Well, I don't believe that it is
11 necessarily that the words 'vocal minority' necessarily
12 describes the group that was seeking to participate in
13 the process and seeking to be heard by government.

14 Q. No, the question is not whether Grand
15 Council Treaty No. 3's interpretation of the public
16 altitude was correct or not or was the same as yours or
17 not, the question was: Was that one of the reasons why
18 Grand Council Treaty No. 3 did not want to participate
19 in a public relations exercise?

20 A. Well, I think the words can be taken
21 for their literal meaning. That is what the letter
22 states. "We continue to be of the opinion that white
23 resistance to recognition of our fishing rights came
24 from a vocal minority which should be shunned and not
25 catered to."

1 Given that that is what it says, that is
2 what it says.

3 Q. And there were other reasons stated
4 in that letter, don't you agree, a little earlier in
5 that same paragraph; that is, the first paragraph of
6 the May 11th letter:

7 "We represent small core communities and
8 our spokesmen do not speak English as
9 a first language or at home. I see no
10 point whatsoever in committing our
11 few people and our resources to an
12 undertaking which we have no expertise
13 which is not directed at our own
14 constituency and in which we do not
15 believe is needed."

16 Are those other reasons that you
17 understand to be reasons why Grand Council Treaty No. 3
18 did not want to participate in a communications
19 strategy?

20 A. Well, again, I have to make a comment
21 and, that is, that I think that in order for these
22 negotiations to work Grand Council Treaty No. 3 is
23 going to have to take some responsibility for these
24 sorts of issues.

25 Q. Sir, you sound like a representative

1 of the rag.

2 A. I am sorry?

3 Q. Now, stop being paternalistic.

4 A. And the Government of Ontario and the
5 governments of Canada will have to take responsibility
6 as well. I think that all parties will have to take
7 some responsibility for that issue.

8 Q. Does this letter go on to say that
9 Grand Council Treaty No. 3 is ready, willing and able
10 to commence negotiations as soon as Ontario comes
11 forward?

12 A. I believe it does say that.

13 Q. But you refuse to come forward,
14 right? You want to do something, or you want to do
15 something else, or you want to do yet a forth thing,
16 but you don't want to negotiate.

17 A. Mr. Colborne, this is very -- I think
18 it is a very profound issue and I think it is one that
19 has far-reaching implications and one that really cuts
20 to the basis of getting along in society and rights in
21 our Constitution.

22 I am of the view that if the parties
23 simply seek to negotiate an agreement without taking
24 into account the very strong concerns of all the people
25 of Ontario, then those negotiations -- we may have a

1 negotiated agreement at the end of the day with
2 everyone having signed it, but we will not have a
3 practical or workable agreement at the end of the day.

4 Q. Sir, you represent the government and
5 the government is there to govern, it is not simply
6 there to engage in public relations and political
7 exercises, it is there to enforce law.

8 A. I think that the Government of
9 Ontario I believe is committed to the concept of an
10 open government and I believe that it is committed to
11 taking into account the views of various people who
12 hold strong views on issues, and I don't believe that
13 they can be ignored. And if they are ignored, I
14 believe that the exercise will not be successful.

15 Q. Any progress to date?

16 A. I expect that the -- as I think I
17 said yesterday, I am not sure -- I am almost certain
18 that the report of the advisory committee has been
19 completed.

20 Q. It is complete?

21 A. That was not a final draft that was
22 given to the press, but I am not sure that it is
23 necessary to get into that. But I know that there is a
24 final draft available now and that I would expect that
25 the Ontario government will be proceeding with these

1 negotiations as quickly as possible now that we have
2 that report.

3 Q. I had asked you earlier when you were
4 talking about hunting to sort of summarize the
5 obstacles faced by Indians who wanted to get their
6 treaty rights recognized in the face of the Migratory
7 Birds Convention Act, we were talking about the fact of
8 having to bring in the Americans and so on and so
9 forth.

10 I now want to ask a similar question
11 about the obstacles facing Indians who want to have
12 their fishing rights recognized. So let's just try to
13 do a checklist.

14 One is that Ontario has to agree and
15 another is that Canada has to agree; is that your
16 understanding?

17 A. I think that in order to have an
18 agreement those parties would have to agree, yes.

19 Q. And now are you also saying in
20 addition to that that the general public or some part
21 of it would also have to agree?

22 A. Certainly not in the same way that
23 the governments or the Indian parties would have to
24 agree. But I would suggest to you that if -- there was
25 a proposed agreement, I am sure you are aware of and I

1 think that you were involved in in 1982 where the
2 government -- where the public...

3 Q. I wasn't.

4 A. You weren't involved in. Well,
5 neither was I, it is just a matter of history for
6 myself.

7 The governments did not consult well with
8 the public and when a draft agreement that was just
9 about ready to be signed, I think it was signed by
10 all -- the Government of Ontario signed the agreement
11 as did Grand Council Treaty No. 3, but the federal
12 government did not sign.

13 And I am convinced that one of the
14 reasons that the federal government did not sign was
15 because it did not have popular support and I think
16 that the federal government on that occasion was of the
17 view that it wouldn't work.

18 THE CHAIRMAN: Well, Mr. Crystal, I think
19 we have got to get back to what the question addressed.

20 Is it the position of the Ontario
21 government that prior to an agreement being signed the
22 government needs the agreement or consent of any other
23 groups other than itself, being the government and the
24 federal government?

25 MR. CRYSTAL: Formal agreement, no;

1 formal consent, no. But I think that the Government of
2 Ontario will not provide its agreement or consent until
3 it has some measure of support from the general public
4 out there.

5 THE CHAIRMAN: What is that? Is that
6 consensus or agreement by other groups? I mean,
7 obviously you will not get the agreement of everybody
8 but do they want a majority of other parties?

9 MR. CRYSTAL: I don't think it will be a
10 matter of polling, but I think there are certainly many
11 groups and many individuals who have come forward to
12 express their very strong concerns and I think those
13 people have to at least participate in the process and
14 that is what we have been trying to give them the
15 opportunity to do.

16 MR. COLBORNE: Q. Mr. Crystal, why does
17 it seem to happen that every time there is a conflict
18 in terms of rights between Indians and government there
19 are about seven buts added to every government
20 commentary on it. Why can't these things just be dealt
21 with straight out like government deals with its other
22 problems?

23 MR. CRYSTAL: A. Well, I think, as I
24 said, it gets down to a balancing of interests.

25 Q. And why are they never settled?

1 These things are never settled, they go on from
2 generation to generation to generation.

3 A. It is my sincere hope that they will
4 be in the not too distant future, at least to some
5 extent, to the extent possible and practical.

6 Q. Yesterday I mentioned that I might
7 have a few clarifying questions of Mr. Kenrick and at
8 that time I didn't have copies of Exhibit No. 226 which
9 has now been entered.

10 I have a few questions arising out of
11 that document which might be better directed to Mr.
12 Kenrick or it might be better directed to Mr. Crystal,
13 I am not sure, I am just asking.

14 Mr. Kenrick, do you have a copy of
15 Exhibit 226?

16 MR. KENRICK: A. No.

17 Q. I think Mr. Crystal has one. Sir,
18 the page at the lower left, can you find page 2.

19 Now, there is a heading Creeping Prices
20 and I want to read you the text following that heading
21 and my question to you is going to be: Do you have any
22 reason to believe that it is incorrect?

23 "Retreat of the fishery in face of
24 advancing settlement in Canada is an old
25 story. A newcomer to this country in the

1 late 19th Century wrote a book on the
2 delights and ways of fishing in
3 Canada. I think on the assert of
4 clear contradiction that the angling in
5 Canada is the finest in the world."
6 World class in other words.

7 "He felt constrained to add, however,
8 lumbering is the great business of Canada
9 and though there is really nothing to
10 prevent the lumbering and fishing being
11 carried on together, yet in this as in
12 many other matters, the lesser interest
13 is sacrificed for the greater and salmon
14 are driven away from most of the great
15 salmon rivers."

16 I am not asking you to agree or disagree
17 with the person, the historical person that quoted,
18 but, sir, do you have any reason to think that the
19 author of this book has misquoted or are you prepared
20 to accept that somebody in that era spoke as he quotes
21 that person to speak?

22 A. I have no reason not to believe his
23 quote about angling in Canada is some of the finest in
24 the world. I would have a small fear that he might be
25 overreacting when he gets talking about demise of it

1 and particularly when he tries to make links between
2 fisheries and lumbering. I would not accept that
3 comment at face value.

4 Q. No, my question was: Do you think
5 the author of this book is quoting correctly a real
6 person or do you have any reason to think he is not?

7 A. No.

8 Q. The next paragraph:

9 "Ill managed..." and now I am reading the
10 text of the author so I want to ask you if you agree or
11 disagree with this one.

12 "Ill managed lumbering operations are
13 only one of the activities that wreak
14 havoc with waterways, destroy spawning
15 grounds and aquatic habitat."

16 Do you agree with that?

17 A. Not in a general sense like that, and
18 I believe there is panels that will subsequently talk
19 about the effect of forestry on aquatic resources and I
20 think those panels will try and establish that --

21 THE CHAIRMAN: We are talking here ill
22 managed, though.

23 MR. KENRICK: Right, and the reference to
24 wreaking havoc on waterways and destroying spawning
25 grounds and aquatic habitat.

1 THE CHAIRMAN: So are you saying that ill
2 managed activities do not create those kinds of
3 impacts?

4 MR. KENRICK: I am sorry. Looking at it
5 that way, I think in a general sense ill managed ones,
6 yes.

7 MR. COLBORNE: Q. Would you go forward
8 sir, to page 5. In the middle of page 5 beginning at
9 the start of the 6th full paragraph it says:

10 "Our information on the contemporary
11 native and subsistence fisheries is
12 meager. Some provincial authorities are
13 unable to provide even ballpark estimates
14 of the numbers of fishermen in these
15 categories."

16 My question to you is, sir: Would
17 Ontario fall into the list of provincial authorities
18 who are unable to do that or not?

19 MR. KENRICK: A. I am not sure that the
20 Ministry could provide a number that would be the total
21 amount of native subsistence harvest. From my own
22 experience in Moosonee, I felt that was a weakness in
23 our information and we did something to get better
24 information. So, in that particular case, I wouldn't
25 agree with the quote.

1 Q. Would you go forward, sir.

2 THE CHAIRMAN: Mr. Colborne, could I just
3 stop you there for two minutes. My secretary has just
4 come to the door and there is something that has just
5 come in by the fax machine from Toronto that I have to
6 attend to so she can get back to it while we are in
7 here.

8 So if I might just adjourn. Everyone can
9 just stay put for two seconds.

10 MR. COLBORNE: Certainly. I can advise I
11 am almost finished.

12 THE CHAIRMAN: Okay. I will be right
13 back because there is some time constraint on this.

14 ---Short recess

15 THE CHAIRMAN: Sorry, Mr. Colborne, I
16 apologize.

17 MR. MARTEL: Can I just get a
18 clarification on the last answer. I am not sure, Mr.
19 Kenrick, with respect to the provision of the figures.
20 That last quote said that our information on the
21 contemporary native and subsistence fisheries, having
22 difficulty reading it, it is meager, and I think Mr.
23 Colborne asked if Ontario could provide figures with
24 respect to the number involved; am I right?

25 MR. COLBORNE: The way I framed my

1 question, sir, was whether Ontario would fall into the
2 list of provincial authorities who were unable to
3 provide that information.

4 MR. MARTEL: I am just trying to get
5 clarification from Mr. Kenrick's answer.

6 MR. KENRICK: To my knowledge, if what
7 you are looking for is a bottom line, a total amount of
8 kilograms of fish harvested by native peoples for
9 subsistence purposes, I don't think it could be
10 provided.

11 MR. COLBORNE: Q. I would ask you, sir,
12 to go forward to page 23, and here beginning on the --
13 beginning with the last paragraph on that page there is
14 reference to depleting fish stock in Canada. Let me
15 just read to you - and I will leave out the parts that
16 refer to non-Ontario areas - let me just read to you
17 from that paragraph:

18 "The catalogue of important fish species
19 that have been seriously depleted from
20 over-fishing in at least some parts of
21 the country is worth emphasizing as a
22 warning: lake trout and brook trout,
23 northern pike, walleye and various big
24 fish in Ontario."

25 Do you agree or disagree that that list

1 of fish species is a generally correct list of species
2 in Ontario which have been seriously depleted?

3 MR. KENRICK: A. Again, I am not sure I
4 would agree with that as a general statement meant to
5 apply to all of Ontario. I am aware of individual
6 lakes where lake trout stocks have been depleted.

7 On balance, I am not aware of where the
8 general stock of northern pike in the province of
9 Ontario has been depleted. I don't think I would agree
10 with that. I stand to be corrected. I just find the
11 statement a little too general, that is all, sir.

12 Q. Let's go on. On page 24, there
13 appears a heading Surveying A Resource and I want to
14 read to you a part of the first paragraph under that
15 heading and, again, excluding references to other parts
16 of the country. I am reading from the second sentence
17 of that paragraph:

18 "In the Great Lakes Basin where the value
19 of fish is greatest and the demands on
20 them heaviest, the story is one of
21 over-fishing and inadequate management."

22 Do you agree or disagree with that?

23 A. I am aware from reading other sources
24 that there is a history of over-fishing in the Great
25 Lakes, some of it dating back - and I believe a

1 previous page talked about - to the 1860s.

2 I don't -- I am not close enough to the
3 issue to make a judgment on adequate or inadequate
4 management on the Great Lakes.

5 Q. Who is?

6 A. Perhaps one of our staff that deals
7 in more detail with the Great Lakes. Again, I have a
8 problem with agreeing with generalized statement.

9 MR. COLBORNE: Perhaps Mr. Freidin can
10 tell me if we are going to have any witnesses who will
11 be testifying in regard to management of the fisheries
12 resource?

13 MR. FREIDIN: Not in a general sense,
14 although we will be having witnesses from the fisheries
15 branch who will be dealing with inter-relationships
16 between fisheries and timber management.

17 MR. COLBORNE: We have here, I believe, a
18 reputable and lengthy and current study of the fish
19 resource that alleges inadequate management and
20 connects it to forestry.

21 I think, Mr. Chairman, that I am not out
22 of place to say that we ought to have better evidence
23 and more indication from Mr. Freidin.

24 THE CHAIRMAN: Well, Mr. Colborne, Mr.
25 Freidin has indicated that there will be some people

1 from the fisheries side of his client's Ministry who
2 may be able to answer that question concerning
3 mismanagement, or they may not.

4 Conversely, you will have the
5 opportunity, if his witness cannot, to call witnesses
6 of your own to allege mismanagement, if that is what
7 you wish to do, or to testify as to whether or not the
8 author of this report is in agreement with the person
9 you call.

10 I do not think every time a question is
11 asked and the party responding indicates that there may
12 or may not be a witness called to address that specific
13 question, it is in order for the Board to order that
14 party to produce a witness that can answer a specific
15 question.

16 MR. COLBORNE: No, I agree, not in every
17 case. I was trying to, in my submission, satisfy you
18 that this was such a case, but I apparently did not.

19 THE CHAIRMAN: Well, we do not know that
20 it cannot be answered yet either.

21 MR. COLBORNE: Q. Now, with respect to
22 the over-fishing aspect of that passage, you said that
23 you agreed that there was some reference somewhere to
24 over-fishing from the 1860s. My question to you is:
25 Do you believe that in the Great Lakes Basin there is

1 over-fishing at the present time?

2 MR. KENRICK: A. I think it would be
3 safe to say that there may be some individual lakes
4 that are over-harvested. I would like to think, if it
5 is handled there the same as it would be anywhere else,
6 that the Ministry would try and put into place, in some
7 cases regulations, limit restrictions, season
8 restrictions to try and correct that.

9 Q. Turn to page 28, please. We are here
10 talking about the Hudson Bay drainage basin and I will
11 read from the first sentence of the last paragraph on
12 that page.

13 "Walleye are declining throughout much of
14 the Hudson Bay drainage region
15 especially..."

16 And then I have left out some areas,
17 "...northern Ontario."

18 Do you agree with that?

19 A. Again, I am having some problems with
20 the general answer. I can think of lakes that, for one
21 reason or another, there is a decline in walleye
22 populations, yes.

23 To make a conclusion in total, we
24 probably enhance some walleye populations in other
25 areas and I don't know whether on balance that leaves

1 us with the same amount. There are a host of things
2 that have affected walleye populations; over-fishing to
3 some extent, formation of reservoirs, other issues.
4 There has also been some things done to enhance walleye
5 fishing.

6 Q. If you look at the next page, sir,
7 page 29, I will read from the first sentence of the
8 text on that page:

9 "Lake trout numbers appear to be stable
10 only in remote watersheds. Alarming
11 declines have been reported from lakes in
12 northwest Ontario."

13 Do you agree with that?

14 A. I am aware of individual lakes that
15 have had - I am not nuts about the word alarming - but
16 declines in lake trout populations, yes.

17 Q. Turn forward to page 31, please.

18 A. 31?

19 Q. Yes. The first sentence of the last
20 paragraph on that page begins:

21 "Walleye are in general decline in
22 Ontario despite stocking although some
23 regions report vigorous populations."

24 Would you agree that walleye are in
25 general decline in Ontario despite stocking?

1 A. I would like to read the context, I
2 think. Could you tell me where page 32 is, the next
3 sentence, it isn't in my copy here. 31, 34, 33, 35.

4 Q. I didn't personally do the
5 photocopying. If you have a copy which is incomplete,
6 I apologize. Perhaps I will simply show you the
7 published original.

8 A. Again, a bottom line I think is hard
9 to determine. The statement walleye are in general
10 decline in Ontario, there are some water bodies where
11 the walleye are in decline. Whether the bottom line is
12 there are less walleye here today than there were
13 yesterday, I don't know.

14 It goes on to talk about walleye in Lake
15 Erie depressed just a few years ago is on the rise
16 again as a result of improved habitat and better
17 fisheries management and that would be part of my, I
18 guess, qualifier there.

19 Q. Well, sir, you are not here simply to
20 emphasize all the good things that your Ministry does
21 or to state its policy, you are here to give factual
22 evidence; is that right?

23 A. That's correct.

24 Q. And is that your understanding of
25 your purpose in being here?

1 A. That's correct.

2 MR. COLBORNE: Thank you, Mr. Chairman.
3 That concludes my cross-examination at this time.

4

5 THE CHAIRMAN: I think we should go back
6 to Mr. Crystal now--

7 MR. COLBORNE: Oh, yes.

8 THE CHAIRMAN: --to deal with the Royal
9 Proclamation question.

10 MR. CRYSTAL: Mr. Colborne, perhaps I can
11 answer the questions and then perhaps you can come at
12 me again.

13 I would suggest to you that up until
14 page - in the outline of evidence, that Royal
15 Proclamation starting at 183, I would suggest that the
16 pages on 183, 184, and 185 up until the words which
17 begin the last complete paragraph:

18 "Where it is best and reasonable and
19 essential to our interests and security
20 of our colonies that the several Nations
21 or tribes of Indians with whom we are
22 connected..." and so on.

23 I am saying that essentially it is my
24 view that from page 183, which is the first page of the
25 Royal Proclamation, up until the paragraph on page 185

1 which begins -- the last complete paragraph on that
2 page: "And whereas it is just and reasonable..." that
3 the provisions of the Royal Proclamation which precede
4 those words are not directly Indian policy.

5 To answer another of your questions, I
6 would suggest to you that those words which follow from
7 that point are entirely Indian policy. You asked me:
8 Do I still agree with the fact that -- where I think I
9 said in my transcript, "and that Indian policy can
10 really be summarized in two points".

11 And I think that the first point was that
12 the land unceded and purchased was reserved for the
13 Indians; and secondly -- the second point being that
14 there was a scheme set out for the surrender of that
15 land.

16 Upon reviewing the Royal Proclamation, I
17 can see that there are more than those two points
18 forming the Indian policy, but I still maintain that,
19 at least in today's context, those two points are
20 really the most important points that survive in the
21 Royal Proclamation.

22 On the matter of trade, I note that on
23 page 186, about 6 or 7 lines up from the second last
24 paragraph, about a little less than a third up the page
25 there is a reference to trade with the Indians. My

1 comments were -- I think in all candor I can say that
2 it was my impression, my general impression of the
3 Royal Proclamation that there were provisions
4 concerning trade other than trade with Indians. It was
5 also my impression that there were provisions about
6 trade with the Indians.

7 It appears that that is the only
8 provision dealing with trade and it does concern trade
9 with Indians.

10 As for travel, I would direct you to the
11 third paragraph on page 186:

12 "And we do further strictly injoin and
13 require all persons whatever who have
14 either willfully or inadvertantly seated
15 themselves upon any lands within the
16 countries above described..."

17 That is, the lands reserved for the
18 Indians.

19 I have taken that and perhaps I am taking
20 the liberty with the words, but I have taken that to
21 mean that people other -- that non-native people are
22 not to travel on those lands that are reserved for the
23 Indians.

24 Those are my answers to your questions.

25 MR. COLBORNE: Q. I asked those

1 questions in the context of your evidence as recorded
2 at pages 7466 and 7467 of the transcript for September
3 7th.

4 MR. CRYSTAL: A. Yes.

5 Q. On those pages, beginning at the
6 bottom of the first and continuing at the top of the
7 second, you said:

8 "There were rules for trade and that
9 those rules to a great extent had nothing
10 to do with Indian policy."

11 A. Yes, and I think I corrected my
12 evidence.

13 Q. And you have now corrected that, yes.

14 A. Yes.

15 Q. You also said at the same place that
16 there were rules for travel and that those rules had
17 nothing to with Indian policy.

18 A. I think I have corrected that as
19 well.

20 Q. You corrected that as well.

21 A. But I think there are -- in fairness,
22 there is a fairly lengthy provision about the rule of
23 law which is to prevail in this new territory and...

24 Q. Oh, come now, sir.

25 MR. FREIDIN: Let him finish his answer.

1 MR. CRYSTAL: And I think that that is
2 not directly Indian policy, and I think that that is a
3 portion of the Royal Proclamation that is, sort of,
4 concerns rules and regulations not directly concerned
5 with Indian policy.

6 MR. COLBORNE: Q. Are you referring to
7 the paragraph that calls for the summonsing of a
8 general assembly?

9 MR. CRYSTAL: A. Yes, and also that the
10 Laws of England - I can't quite find the spot- but the
11 Laws of England as they are more or less applicable
12 shall apply.

13 Q. Don't you know that one of the great
14 grievances arising out of this has nothing to do with
15 Indians, is that general assemblies were never
16 convened?

17 A. No, I wasn't aware of that.

18 Q. So what we have here -- you have had
19 a chance to read it so maybe I can ask you if you would
20 agree with me. Starting at the beginning, first we
21 have a description of the four governments and that
22 takes up a page and little bit in the version that is
23 reproduced here; is that right?

24 A. Yes.

25 Q. Next, we have a little bit of detail

1 about -- I don't think I will even bother mentioning
2 things like a little bit of detail about Cape Breton,
3 it just doesn't occupy much space.

4 A. Okay.

5 Q. This is completing the description of
6 the governments. Then the next thing is a lengthy
7 paragraph on the second page, as we have it, calling
8 for the summonsing of general assembly and saying that
9 in the meantime -- before we get general assembly that
10 might make laws, in the meantime the Laws of England
11 will apply.

12 A. Yes.

13 Q. And do you agree with me that what we
14 have referred to already takes up almost two pages of
15 what we have?

16 A. Yes.

17 Q. And then starting at the bottom of
18 the second page and concluding at the top of the third
19 page, we have the King giving authority to his
20 governors to sell land?

21 A. Yes, which is disposal of land.

22 Q. Well, yes, I guess that would be a
23 broader term than sell. And then we have authority to
24 the governors of these territories to grant land to
25 soldiers and sailors?

1 A. Yes.

2 Q. And then we have the Indian policy?

3 A. Yes.

4 Q. And that is it?

5 A. Yes.

6 MR. COLBORNE: Thank you.

7 THE CHAIRMAN: Thank you, Mr. Colborne.

8 MR. COLBORNE: Mr. Chairman, if I may, I
9 don't know if I am in order here, I think I am senior
10 counsel here from the City of Thunder Bay. I want to
11 take this opportunity to invite everybody that has to
12 do with this hearing to a little social event.

13 THE CHAIRMAN: That covers most of the
14 population of Ontario you realize.

15 MR. COLBORNE: They are all invited.
16 What I have in mind is September 27th, which I think is
17 going to be part way through the last week of hearings
18 in the present month. I want to invite yourself, Mr.
19 Chairman, the other members of the panel, all the
20 counsel, anybody associated with the hearing to an
21 evening of just relaxing.

22 This will be at what we around here call
23 a camp, which some people in the south call a cottage.
24 It is in the middle of the bush, that is what we call
25 it, some people call it -- Ministry of Natural

1 Resources calls it forest, and I have made a little
2 sketch which is possibly more convoluted than my
3 questions, and I am not asking that it be marked as an
4 exhibit, but here it is. (handed)

5 THE CHAIRMAN: Well, thank you, Mr.
6 Colborne. On the basis that we do not discuss anything
7 to do with this hearing whatsoever and truly relax, I
8 think certainly on behalf of myself and my colleagues
9 we would be happy to respond to your hospitality and I
10 am sure the others will as well.

11 MR. COLBORNE: Mr. Chairman, I have
12 enough photocopies of this.

13 MR. REILLY: Mr. Chairman, perhaps while
14 Mr. Colborne is passing this out, I wonder if I could
15 beg the copies of the exhibits that are on that far
16 table, being at the back of the bus here we ran out.

17 THE CHAIRMAN: Certainly. How long do
18 you intend to be, Mr. Reilly, when you start your
19 examination, just as a ballpark?

20 MR. REILLY: Well, I would think
21 someplace in the neighbourhood of two to three hours.

22 THE CHAIRMAN: All right. And I take it
23 that we should probably start with yours today.
24 Would you be prepared to start today?

25 MR. REILLY: Yes.

1 THE CHAIRMAN: And then continue on
2 tomorrow. And we will try and limit the discussion of
3 the Board's ruling, which will be handed out later
4 today concerning clarification of the Board's ruling,
5 to no more than a half hour so that we will be in a
6 position to certainly finish your examination tomorrow
7 and then possibly get into Mr. Castrilli's to some
8 extent.

9 Mr. Babcock, I notice you arrived today.
10 Were you going to be conducting a cross-examination of
11 this panel at all?

12 MR. BABCOCK: No, Mr. Chairman, I was
13 just updating myself on where the hearings were and
14 hope we would get a draft copy of the decision on the
15 procedural motion while I was here.

16 THE CHAIRMAN: Very well. Thank you.

17 At this time, Mr. Reilly, we are going to
18 take about a 15-minute break and then we will come back
19 and sit for perhaps an hour.

20 Thank you.

21 ---Recess taken at 5:00 p.m.

22 ---Upon resuming at 5:15 p.m.

23 THE CHAIRMAN: Thank you, please be
24 seated.

25 THE CHAIRMAN: Mr. Reilly?

1 MR. REILLY: Thank you, Mr. Chairman.

2 CROSS-EXAMINATION BY MR. REILLY:

3 Q. I propose to deal with the two
4 witnesses in the same order in which they gave evidence
5 and start with Mr. Kenrick.

6 Mr. Kenrick, by way of generalization,
7 would you look at page 41, the map which you provided
8 us with and Figure 1 shows Ontario in relation to the
9 map of Europe. How does the area of the undertaking
10 compare?

11 Is it, for instance, the size of England,
12 Ireland, Scotland or the size of Germany or larger, can
13 you tell me?

14 MR. KENRICK: A. To be accurate, I would
15 want to take a look at the area figures for those.
16 Just looking at the relative size on the maps, England,
17 Ireland and Scotland and that is just an observation.

18 Q. Okay. And page 43 of your evidence,
19 you indicate the area is larger than the Maritime
20 provinces. If you were dealing with that size of an
21 area, would you agree that it would be usual to do more
22 detailed specific reports on area than we were doing
23 here in this report of yours?

24 A. Again, I think the intent of this
25 panel was to provide that overview and that is the

1 reason that Panel 7 exists and subsequent panels, and
2 also the reason that when we are managing that resource
3 we deal with it at a management unit basis.

4 Q. Would it be reasonable to ask for
5 more detailed evidence when you are dealing with an
6 area of this size? I think we lose the size of the
7 area, lose the scope of it being so general.

8 A. Okay.

9 Q. On page 45 in the second paragraph,
10 you deal with the size of the area of the undertaking
11 in relationship to the size of the area of the
12 province, and regarding specifically the words "the
13 actual area of the undertaking", would you agree that
14 people living adjacent to the actual area of the
15 undertaking, the 36 per cent, may well be affected by
16 the findings and orders of this panel?

17 A. Yes, yes.

18 Q. Would you agree that we are dealing
19 with not really 36 per cent of the province but
20 probably 44 per cent and maybe a little bit larger?

21 A. In terms of the amount of the
22 province that the undertaking may have an effect on,
23 yes, a larger number.

24 Q. Moving to pages 46 and 47 which are
25 both graphs. If you followed it down, as I interpret

1 these, they are an attempt to somehow limit the size of
2 the undertaking to the size of the area affected, and I
3 would suggest to you that if you follow these graphs
4 and the limitations, that they actually exclude many
5 areas where people live and where people are directly
6 affected.

7 Would you agree with that?

8 A. As you get to the bottom of the
9 chart, most people would live within - I am just
10 looking at Figure 4.1 - would live within northern
11 Ontario, the area that is shown within the 465,000, for
12 instance, because it would be all ownerships.

13 You are right, most people do not live --
14 reside, if you will, on Crown land which is what we are
15 trying to get at as we get down that chart, yes.

16 Q. If you would move over to page 51,
17 please and the first complete paragraph, the last few
18 lines, the last three lines I guess, and starting at:

19 "Timber management activities occur on or
20 about five per cent of the area of the
21 productive forest at any one point of
22 time."

23 Does that necessarily follow that over
24 the 20-year plan proposed that a hundred per cent of
25 the area would be utilized?

1 A. No.

2 Q. It doesn't. Would you explain that
3 to me?

4 A. Again, yes, there is some overlap
5 there. The way the five per cent figure was derived,
6 first of all, is very much a generalization and it is
7 area that is harvested this year, areas that may be
8 impacted upon because they are being accessed for next
9 year, renewal operations that may be areas that were
10 harvested in last year, so it is not cumulative
11 totally.

12 Q. Might it be more and, therefore, take
13 less than 20 years? I presume since 5 per cent is an
14 estimate it could be more or less than five per cent;
15 would that be fair to say?

16 A. Yes.

17 Q. Mr. Kenrick, perhaps move to page 59,
18 and you mention groundwater storage area or aquifers.
19 On the second -- in the second complete paragraph in
20 about the fourth line down it says:

21 "There are no known major aquifers..."

22 And the last sentence in that paragraph
23 says:

24 "Where aquifers are known to exist in the
25 Precambrian area, they are generally

1 adjacent to municipalities."

2 That confuses me. Could you treat them
3 as opposing statements?

4 A. If I could just read the paragraph
5 for a second. I believe the first reference is one to
6 aquifers in bedrock and the second one is a reference
7 to aquifers in overburden.

8 Q. Okay.

9 A. That paragraph is meant to address
10 both situations.

11 Q. Then between the two statements there
12 is a line there that says:

13 "Aquifers are scarce and generally
14 small."

15 And a couple of lines down:

16 "Demand for groundwater from sand and
17 gravel deposits is small."

18 Can you be a little more specific with
19 that? Are there aquifers that are used for water
20 supplies?

21 A. Yes, there are. The community I live
22 in happens to be one of them. I think the point being
23 made there is that with an abundance of surface water,
24 particularly within the area of the undertaking, from
25 which a community would be drawing its water supply, in

1 many cases there is not the need to go into something
2 like an expensive drilling project to obtain that water
3 from an underground aquifer.

4 There are exceptions, a portion of the
5 City of Timmins, Mount Joy, gets part of their water
6 rather from surface water, gets it from wells.

7 Q. Similarly with the City of Sault Ste.
8 Marie?

9 A. (nodding)

10 Q. So it is small, I take it, you mean
11 in context of servicing the whole municipality and not
12 necessarily small in size?

13 A. I believe it can also be taken in
14 comparison of size. I am just trying to recall the
15 document that this information came out of and I think
16 it was making a comparison to large aquifers in the
17 Oakridges region north of the City of Toronto or one
18 down by Bradford, I believe.

19 And the document was suggesting that just
20 in terms of physical size, those ones in southern
21 Ontario, non-Precambrian, were physically much larger
22 reservoirs, if you will, than some of the ones that
23 were located in, say, northern Ontario.

24 Q. Thank you. Now, if you look at
25 Figure 16.2 on 74, please. This shows a distribution

1 of trout lakes in Ontario and there is certainly a
2 tremendous number of dots. Does that show -- purport
3 to show all of the trout lakes within the area of the
4 undertaking?

5 A. I believe that it was an attempt to
6 show the 2,105 that were recorded lake trout lakes in
7 the province. I believe that is what it was trying to
8 do.

9 Q. Does that mean that there are no more
10 than -- there are 2,105 lake trout lakes period in
11 which; in what area?

12 A. In the province.

13 Q. In the province. Looking at the area
14 around where Sault Ste. Marie is on the map; and there
15 are three dots fairly close to it, does that mean that
16 that is all the recorded lake trout lakes within that
17 region?

18 A. I guess it is a problem of scale. My
19 belief is there are more than three lake trout lakes
20 adjacent to Sault Ste. Marie, but Sault Ste. Marie
21 District would be larger than that where those three
22 dots are.

23 Q. Those three dots, have you got a feel
24 for how far that is from the river? What kind of
25 distance does that area cover?

1 A. I wish I had a scale on the map but I
2 don't. I would be hardpressed to guess that.

3 Q. Do you agree with me that it is
4 somewhat lacking in particularity and accuracy because
5 of the size of the map?

6 A. That's true.

7 Q. On page 76, the graph of the
8 population of Ontario, I presume this is 1981 based,
9 1981 census?

10 A. I believe it was '86.

11 Q. Actually, I thought most of your
12 material was taken from '81 census?

13 A. I can check that.

14 Q. In fact, I was going to ask you
15 whether you used the '81 census?

16 A. The report that I took that from, I
17 have just noticed it says from the Ministry of Supply
18 and Services Canada, 1987, so I suspect it is 1986
19 census for that particular one.

20 Q. Is it fair to say that most of the
21 material you have used is from the '81 census, in your
22 report?

23 A. Certainly the native information was
24 exclusively out of '81.

25 Q. Would you tell us again, please, why

1 you used the '81 census over the '86?

2 A. Again, the most recent - and some of
3 this was, I guess, on the advice of Ontario Native
4 Affairs Directorate - as I asked them, if the document
5 I used as my source was the most up to date and
6 reliable of what I could get my hands on and they
7 confirmed that was true because of problems with
8 reporting in the 1986 census.

9 Q. Problems in reporting. What is the
10 procedure for the taking of the census? Are there
11 oral questions, written questions?

12 A. I understand written.

13 Q. What is the effect if a person is
14 illiterate?

15 A. I assume they would have some trouble
16 answering the questions.

17 Q. In the 1981 census, the question was
18 asked:

19 "To which ethnic or cultural group did
20 you or your ancestors belong on first
21 coming to this continent?"

22 Would you agree that a person of mixed
23 background would look to their Scottish, Irish, French
24 or whatever ancestry in answering that question rather
25 than their native ancestry?

1 A. Probably.

2 Q. And I take it you would agree that
3 those words coupled with the use of the words ethnic or
4 cultural would suggest an answer relating to non-North
5 American origin?

6 A. Possibly.

7 Q. That leaves some doubt in your mind
8 as to the validity of the answers as far as native
9 people?

10 A. In my mind --

11 Q. Mixed blood?

12 A. In my mind, ethnic might, cultural
13 may not.

14 Q. Would you agree that if it did lead
15 to some misinformation being given it would result in
16 an underestimation of the number of native people?

17 A. Correct. I believe one of the
18 reasons that is acknowledged that the 1986 census was
19 less reliable is it was an underestimation. Why people
20 chose not to participate in it, I guess is up for
21 discussion or debate.

22 Q. Yes. I think the question is phrased
23 in white man's terms basically; would you agree with
24 that?

25 A. I find your wording a little awkward.

1 I am white and I can understand it, yes. I don't
2 generally go through text and pick out...

3 Q. Were you aware that in the 1986
4 census, the words "on first coming to this continent"
5 were left off the question?

6 A. No, I wasn't.

7 Q. I thought that might be one of your
8 considerations in choosing the '81 census.

9 A. No, it wasn't.

10 Q. Do you still feel that 1981 is more
11 accurate than 1986 in referring to the Metis and
12 non-status Indians segment?

13 A. On the advice of both the consultant
14 who prepared the report and used it, and I believe he
15 quotes that, and my wishing to get that confirmed by
16 ONAD I believe it to be so.

17 Q. Are you aware of a Drea Study in 1976
18 estimating the Metis and non-status Indian population
19 at between 50,000 and 70,000?

20 A. I know there are higher estimates
21 than the 1981 census, I am not sure if I have ever seen
22 that specific study.

23 Q. Are you aware of the Secretary of
24 State Study in 1977 which estimated the same population
25 at 94,200?

1 A. I am not sure I have read that
2 specific study. I am aware there are other estimates.

3 Q. Are you aware the Canadian Employment
4 Immigration Commission study in '78 estimated the
5 population at 50,000?

6 A. No.

7 Q. Are you aware of the Ontario Task
8 Force on Native People in Urban Setting Study in 1978
9 estimating the Metis and non-status Indian population
10 at 117,000?

11 A. I am not, but I would assume that
12 organizations like the Ontario Native Affairs
13 Directorate are aware of it and were aware of it when
14 they gave me the advice that this was probably still
15 the best data to use.

16 Q. Are you aware of the Ontario Metis
17 and Aboriginal Association Study in '81 estimating the
18 Metis and non-status Indian population at 180,000?

19 A. No.

20 Q. Are you aware there was a Secretary
21 of State Study in 1982 estimating the same population
22 of 115,000?

23 A. No.

24 Q. I was going to ask you why you used
25 the lowest figure.

1 A. It wasn't intentional.

2 Q. Is this your research that leads to
3 this report, leads to the choosing of that particular
4 figure, or was it someone else's research?

5 A. That led to the decision to use that
6 document?

7 Q. Yes.

8 A. I was aware of that, the document,
9 and it was fairly recent. It was one of the things
10 that led me to make the conclusion that that would be
11 an appropriate one to use. But prior to using it, I
12 wanted to check the validity of it and I chose to have
13 that validity checked, if you will, through the Ontario
14 Native Affairs Directorate.

15 Q. But you didn't check for any
16 further -- any other studies?

17 A. Having asked them if that was an
18 appropriate source of native affairs statistics in the
19 Province of Ontario and received the answer yes, I
20 didn't look around for other studies, that's correct.

21 Q. It might lead one to the conclusion
22 that they are not well informed.

23 Would you move over to page 77, please,
24 and the first -- lines 2 and 3.

25 "There are 162 municipalities with

1 populations of less than 3,000 in
2 northern Ontario."

3 Would you agree that these communities
4 are likely to be more vulnerable to disruption of their
5 natural habitat than larger population areas?

6 A. Disruption of their natural habitat?

7 Q. Yes.

8 A. I am not sure what you are --

9 Q. Well, let's call it destruction of
10 the forest around their area, they are likely to be
11 more subject to disruption?

12 A. Do you mean that the magnitude of the
13 impact on any one acre outside a small community as
14 opposed to any one acre outside a large community? I
15 am not clear on your question.

16 Q. That is one way of putting it, but
17 really I was thinking of major forest work that might
18 affect trapping, fishing, hunting.

19 I would suggest to you the impact would
20 be much more on a small northern community than it
21 would be on a larger city and there are 3,000 -- or 182
22 of these small municipalities.

23 A. I wouldn't feel comfortable
24 necessarily agreeing with that. There would be
25 resource impacts adjacent to small municipalities and

1 there will be resource impacts adjacent to larger ones.

2 Q. Turning the page over to page 78.

3 Now, in this one you use 1987 figures, I take it?

4 A. That's correct.

5 Q. Yes. What is a northern region, what
6 does it mean geographically?

7 A. In a general sense - and I would have
8 to look at the census divisions - but it is the sum
9 total of those census divisions that are, I believe - I
10 would have to go back and check - but I believe the
11 ones that are roughly north of the French River. That
12 was my attempt.

13 Q. So it would take in part of the area,
14 it would overlap on the area of the undertaking leaving
15 some area out?

16 A. I believe so.

17 Q. And put another area in, for
18 instance, north of the undertaking would be included
19 which...

20 A. That's true. Certainly that is true.

21 Q. Just for clarification, on page 79 at
22 the end of your first paragraph you talk about a
23 discussion paper prepared for Ontario Native Affairs
24 Directorate. Is that using the '81 census figures, do
25 you know?

1 A. Yes, that reference is towards a
2 framework for native economic development policies and
3 programs in Ontario, dated January, 1987.

4 Q. Generally, what is the trend, and I
5 am looking really at Figure 19, I suppose. What is the
6 trend between '81 and '87 in the labour force in
7 primary forestry? Is the trend toward more employment
8 or less employment?

9 A. My understanding is less because it
10 is becoming more automated...

11 Q. And the trend in the service
12 industry, would it be the reverse; would it be more?

13 A. I understand it to be.

14 Q. On page 83, the last paragraph, the
15 first sentence:

16 "Employment rates for natives in Ontario
17 differ from those for non-natives."

18 Would you agree that any disruption of
19 work environment takes a heavier toll on native people
20 than on non-native people?

21 A. It has been my experience and, again,
22 from farther north - and this may apply to it - is it
23 is inclined to because there may be fewer alternatives
24 to obtain work.

25 Q. And is that the only reason because

1 there are -- you mean fewer alternative jobs?

2 A. Yes.

3 Q. Does is also have anything to do with
4 the education background of the workforce?

5 A. Probably.

6 Q. The next page over, Mr. Kenrick, page
7 84, Figure 21. This is for all of Ontario, I take it?

8 A. I believe so.

9 Q. Does the 38 per cent in forestry
10 include those native people who may not be employed
11 full-time in forestry but may supplement their income
12 with wood lot use or logging that they may do from time
13 to time? Is this permanent employees?

14 A. I believe the way the Stats Canada
15 information is derived is to ask you on the date of the
16 survey: Were you employed in the forestry business.

17 So I guess one could assume that if that
18 was an off-season for their involvement in forestry
19 activities the answer might be no. The part-time
20 involvement in that particular year may be
21 under-represented.

22 MRS. KOVEN: You also mentioned earlier
23 about the 26-week requirement that you consider to be
24 out of the workforce, if you hadn't been employed 26
25 weeks before.

1 MR. KENRICK: That is my understanding.

2 MR. REILLY: Q. This graph takes in the
3 whole of Ontario. It seems to me that this is of
4 rather small meaning considering the area of the
5 undertaking.

6 MR. KENRICK: A. Could you clarify your
7 question?

8 Q. Well, it seems to be so general.
9 This graph relates to all of Ontario and I am
10 suggesting to you that we are dealing with less than
11 half of the province and this really isn't necessarily
12 a representative graph of what is happening in the area
13 of the undertaking? It may be, but it may not be.

14 A. Specifically for the forestry numbers
15 that are shown there, given that I assume most of the
16 primary forestry jobs are within the area of the
17 undertaking...

18 Q. Why do you assume that?

19 A. I believe we are talking about the
20 harvesting component here and my understanding is that
21 a major portion of the province's volume comes from
22 within the area of the undertaking.

23 It may be inaccurate, I am not
24 questioning that portion of your question.

25 Q. And your definition of native

1 includes, I believe in what you used, Metis, Inuit,
2 status Indians, non-status?

3 A. That's correct.

4 Q. And with your experience you think
5 there are only 905 employed in the forestry industry,
6 or are you basing that on 1981 census figures of the
7 number of...

8 A. I am basing it on the document that I
9 based it on. There may be some problems with that
10 number to do with: Is the regeneration activity
11 accurately recorded as part of the primary industry
12 figures for forestry in the 1981 census, some of the
13 renewal activities.

14 Q. ,I would presume that in fishing and
15 trapping it also excludes those who are fishing or
16 trapping part-time, either that or there aren't very
17 many?

18 A. As I understand the form of the
19 questions, if they weren't fishing and trapping at the
20 time of the survey they could possibly be excluded.

21 Q. Would you agree with me that this
22 graph really is of little value?

23 A. I would -- it is the best I could
24 find, sir. I would have been happy to have better
25 data.

1 Q. All right, thank you. Moving over to
2 page 86, please. You list the native involvement in
3 forest management activities on that page and the
4 following page.

5 I would like you to give me an estimate
6 for each one of those, the involvement of the status
7 and non-status Indians in each one of these. For
8 instance, in the first one I would presume that that
9 would only deal with status Indians since it is only
10 dealing with reserves?

11 A. Right.

12 Q. And then the next one in 1986, the
13 word native there?

14 A. I couldn't give you a breakdown of
15 how many of those Order-in-Council licences or DCLs
16 were either status or non-status people.

17 Q. Were there any of them that were not
18 status?

19 A. I don't know.

20 Q. The next one, the 1.08-million trees
21 provided. What is the meaning of Indian lands --
22 provided for Indian lands?

23 A. I believe that would be reserve
24 lands.

25 Q. And the next one:

1 "In the past Ministry of Natural
2 Resources has held unalienated Crown
3 timber close to reserves to enable
4 licensing to native people."
5 Would that in effect be status people
6 only?

7 A. It may well involve some non-status
8 people. One of my references there by an illustration
9 was around Nipigon and the native people adjacent to
10 Nipigon and Beardmore. I would have to check, but
11 there well could be some non-status people involved
12 there.

13 Q. Do your references give any idea of
14 the number involved here?

15 A. No.

16 Q. So we don't know if we are dealing
17 with ten or a hundred. In the last paragraph:

18 "Has participated with natives, third
19 party licensed negotiations with existing
20 licensees."

21 And you name the Moose Band. Are there
22 others?

23 A. I am aware of discussions, and I
24 think I listed them in my evidence, of other
25 negotiations that have either taken place in the past

1 or are on-going at the time this was being read.

2 Just as reference, I believe I made
3 reference to the White Sands Development Corporation,
4 the Armstrog Band, Red Rock Band in discussions
5 Osnaburg and Saugene and the Lac Soeul Band.

6 Q. They are all status?

7 A. Mostly status.

8 Q. Have there ever been attempted
9 negotiations with the Ontario Metis and Aboriginal
10 Association in this regard?

11 A. Do you mean provincially?

12 Q. Mm-hmm.

13 A. Not that I am aware of.

14 Q. On page '86, top, here again a
15 prototype native-owned company and I presume that there
16 is just the one and it would be dealing with Treaty 3
17 area; am I correct in saying that?

18 A. That's correct.

19 Q. Which again is status Indians. Now
20 the native tree planters:

21 "And advise native groups..."

22 That is the next paragraph:

23 "...on establishinbg contracting
24 companies to bid on company, Crown, FMA
25 planting contracts."

1 Can you give us any kind of a breakdown
2 between status and non-status that you are dealing with
3 there?

4 A. I could not give you a precise
5 number, no.

6 Q. Have there been some non-status?

7 A. In terms of tree planters, logic
8 would tell me, yes, I know of tree planters that have
9 come down from Moosonee district and some of them were
10 non-status people.

11 Q. And...

12 A. Most of them would not have been.

13 Q. And the advising of native groups
14 referred to, is that would you think advising of status
15 Indians?

16 A. The illustrations I have are
17 references to band status.

18 Q. The next paragraph: Have hired and
19 trained natives to--

20 "Private contractors have hired and
21 trained natives to work on planting
22 contracts."

23 Again, is that divided between status and
24 non-status, or is it all status, or just...

25 A. I am sure there would be some status

1 and non-status, but I couldn't put a number on them.

2 Q. Well, the next one I guess is
3 Islington Band and that would be strictly status; would
4 it not?

5 A. I would assume so, yes.

6 Q. The next one:

7 "Native people have been hired on both
8 tending and cone collection program."

9 how many people are we talking about
10 there?

11 A. On an annual basis, I couldn't put a
12 number on it. As I mentioned before, those kinds of
13 statistics are almost impossible to collect.

14 Q. And the next one:

15 "The Ministry of Natural Resources
16 annually trains and hires northern
17 natives for forest fire suppression
18 duties on fire crews."

19 How many northern natives are trained in
20 the course of a year?

21 A. It would obviously vary. In terms of
22 those hired, I believe we had up to 800 this year, but
23 at one point in time I now there was a training camp
24 held at Ogoki which was one of the major efforts to
25 provide some training.

1 I know annually some of the northern
2 districts hold a training session. Moosonee did when I
3 was there. Again, I would be hard pressed to give you
4 the exact number for this year.

5 Q. Is there a definite effort made to
6 provide this training to non-status Indians?

7 A. I would say no, not a program
8 directly aimed at them.

9 Q. And the last paragraph refers to
10 there: "I Count Survey." Is that a survey based on
11 the 1981 census?

12 A. No, that was a survey undertaken by,
13 I believe, the Ontario Human Resources Secretariat,
14 canvassing civil servants in the Ontario government.
15 It wasn't connected to the Canadian census.

16 Q. Would I be correct in stating that
17 certainly the vast majority of the examples you have
18 given are referring to status Indians and not to
19 none-status Indians on pages '86 to '87?

20 A. Probably correct.

21 Q. I am not sure if it was yourself or
22 Mr. Crystal that said something in response to a
23 question on native input, it is not for lack of trying?

24 A. That was me.

25 Q. It was you. I would ask you to

1 reconsider that in light of this.

2 Mr. Kenrick, you indicated concern that
3 native people were not available to work for the MNR,
4 but did you indicate what the MNR is doing along the
5 line to train off-reserve native people? Are they
6 doing anything?

7 A. I believe one of the things that I
8 mentioned was initiating an employment equity program
9 in line with one of the thrusts of the Ontario
10 government coming out of one of the more recent Throne
11 Speeches and part of that is to develop a data resource
12 management, if you will, an apprenticeship program to
13 improve our in-house training.

14 We have designed, in some cases, the
15 training of firefighters as part of that present
16 initiative. We have developed programs too that I am
17 aware of up in Moosonee. One was called the native
18 junior ranger program, was tailoring the provincial
19 junior ranger program to a native audience.

20 Something else called coastal ranger
21 program was to try and get native people in the
22 communities working on natural resource issues.

23 Q. Now, by native people are you using
24 the broad sense of the term that you used before
25 including Metis and non-status, or are you basically

1 referring to status Indians?

2 A. I am not sure it was aimed at one --
3 I think it was aimed at both of those groups
4 collectively, but you are probably right in your
5 observation that where we have hired people in those
6 programs, my guess would be it was largely acted upon
7 by status people.

8 Q. Page 92, we are into provincial parks
9 and you mentioned four objectives a third of the way
10 down the page. In your testimony, you mention the
11 Pancake Provincial Park as contributing to heritage
12 appreciation.

13 And I am curious. What manner of
14 heritage appreciation does the Pancake Provincial Park
15 contribute towards?

16 A. I would have to look at the Master
17 Plan for that particular park. What that was drawn
18 from is recreational classes of parks make a
19 contribution to the heritage appreciation objective.

20 That use of the word heritage there, I
21 guess perhaps needs some -- to provide opportunities --
22 when I read that heritage appreciation objective, it
23 went to provide opportunities for exploration and
24 appreciation of the outdoor natural and cultural
25 heritage of Ontario. Appreciation of our surroundings,

1 I think would be another way of wording that.

2 Pancake Bay has some beautiful
3 surroundings. It may be a misunderstanding with the
4 word heritage in that case.

5 Q. Well, basically any provincial park
6 would fit that bill then, would it not, unless it is an
7 awfully ugly provincial park, which I presume there are
8 none of?

9 A. As I look down all of the classes of
10 parks here in reality, all of the classes of parks meet
11 the heritage appreciation objective to some extent.
12 They are a little more selective with some of the other
13 ones.

14 Q. Just the fact of being a park would
15 meet the heritage...

16 A. It appears so.

17 Q. Yes. Can I move you to Figure 27 on
18 page 102 and I think on this one it seemed to me you
19 put a new large-scale map up on the board, I think. I
20 don't think we need it.

21 But I just wondered: Does either that or
22 the exhibit you showed in the larger scale, does it
23 show all the mines and gravel pits in the area of the
24 undertaking?

25 A. This one that you are looking at here

1 was replaced by the one that was on the slide. This
2 one over-represents the non-metallic minerals. I
3 understand that the abundance of dots in southern
4 Ontario reflects gravel pits.

5 And it under-represents -- I believe you
6 can count them, 16 or 17 triangles on that map, and in
7 effect there is 52 operating metallic mineral mines in
8 the north and the correction was on the slide that I
9 showed.

10

11 Q. And it included all of the gravel
12 pits?

13 A. No, it didn't.

14 Q. Oh, it didn't.

15 A. Gravel pits were not on it.

16 Q. Oh, okay. The next, page 103, at the
17 bottom starting on trapping, just a few general
18 questions on that. What is the average area of a trap
19 line?

20 A. Provincially I couldn't give you that
21 number. I don't know what it is.

22 Q. Well, there are 17,500 I believe -- I
23 think on page 104 you say 17,500 licensees, licences
24 issued to trappers.

25 A. That's right.

1 Q. And you don't have any idea of how
2 much land they need to utilize their licences?

3 A. It is the difficulty in trying to
4 give a provincial average. In some districts I worked
5 in - I am just trying to envision the trap line map -
6 they might be a township or a couple of townships. 36
7 square miles, 72 square miles.

8 The ones up the Hudson Bay coast were
9 considerably larger than that, a couple of hundred
10 square miles.

11 Q. It take up a significant portion of
12 the area of the undertaking then by the sounds of it..

13 A. That's correct.

14 Q. Are there any trappers that depend on
15 their trap lines for all or a substantial portion of
16 their livelihood?

17 A. I assume there are some, not the
18 majority, though.

19 Q. These people -- would I be correct in
20 assuming that they would have a very difficult time
21 replacing that livelihood, they are probably untrained
22 for anything else. Would that be a fair statement?

23 A. Which people are you talking about?

24 Q. The people that depend on trap lines
25 for their livelihood.

1 A. Totally for their livelihood?

2 Q. Yes.

3 A. That sounds like a logical
4 assumption, but I wouldn't want to state it as a rule.

5 Q. And I am just referring now to the
6 area of the undertaking, and not necessarily Moosonee,
7 I realize it would be different there, but in the area of
8 the undertaking do trap lines generally depend upon
9 forest habitat?

10 A. Generally they are in forested areas
11 but not exclusively. A good number -- all of the trap
12 lines -- most of the trap lines that are listed as
13 resident, for instance, have a tendency to be on
14 private land and, therefore, in an agricultural setting
15 and it may not...

16 Q. But they generally require forest; do
17 they not?

18 A. That's true.

19 Q. You stated, I think in your evidence
20 or perhaps in here that the trap lines tend to be
21 under-harvested. Would you apply that type of
22 statement to the true professional trapper, or is that
23 a result of a lot of perhaps part-time trappers?

24 A. I am not sure I could answer that.
25 It would strike me again that persons who trap full

1 time would stand a larger chance of trapping of the
2 full quota off their trap line.

3 Q. Yes, I would think so. Would the
4 utilization of a trap line be different in one area of
5 the province than another?

6 A. I would expect so. Access would be
7 one of the major factors.

8 Q. You mentioned that about Moosonee,
9 the distance, the weather.

10 A. Yes.

11 Q. But perhaps in the area of the
12 undertaking that wouldn't be such a factor.

13 A. In terms of the distribution of
14 trapping around an individual trap line, I believe it
15 still is a factor. There may be places on that trap
16 line, because of ease of access or the nature of the
17 water courses, that some areas could trap more than
18 others, some areas are more difficult to get at.

19 Q. One of the problems in the far north,
20 Moosonee I take it, is the lack of shelter and the long
21 distances between places where animals might be found
22 in the extreme conditions in the winter.

23 I would think that would not be the case
24 in the area of the undertaking to the same degree
25 because there is more forest.

1 A. The densities would be lower in the
2 far north, that is correct.

3 Q. On that same page, 104, the last
4 sentence:

5 "Even more frequently Ministry of Natural
6 Resources staff meet with local trappers
7 councils, Indian bands and individual
8 trappers."

9 Can you tell me, what do you mean by --
10 what type of frequency are you talking about? What is
11 the purpose?

12 A. The majority of the contact with
13 trappers is through -- what I was getting at here is
14 through the district office at a local level as opposed
15 to provincial and regional setting. In a normal
16 district office in the normal course of a week there
17 would be usually numberable Trappers in. People...

18 Q. These are not invitational meetings
19 set up for a particular purpose, I take it?

20 A. Well, they include both; they include
21 instances where Ministry staff go out to address
22 trappers and also cases where trappers come to the
23 office to address us.

24 Q. How do you notify the trappers of
25 these meetings?

1 A. Through -- the most common way that I
2 familiar with is perhaps through the local trappers
3 councils. We get in touch with their membership, we
4 may have a joint meeting to talk about something in
5 common.

6 Q. But if trappers are out in the field,
7 surely they are not accessible to either notification
8 of a meeting or a meeting?

9 A. I would say that we would try not to
10 have meetings with trappers at the height of the
11 trapping season, recognizing that.

12 Q. Frequently then does not refer to all
13 year long, necessarily. In fact, probably is does not

14 A. That's correct, but it may well be at
15 the -- I think of the winter months as people are
16 coming back and forth from their trap lines, they are
17 in the office quite frequently getting first yield.
18 And if we want to have an announcement or talk to any
19 of them individually or let them know that we have got
20 something arranged for the following month, a sign in
21 the office or a discussion between the conservation
22 officers and the individual trappers would be a way
23 that is done.

24 Q. So it is not an organized method of
25 giving notice, I take it?

1 A. It can. I have also seen ads in
2 newspapers which is a more organized way of doing it.

3 Q. Yes, if the person is literate.

4 A. Correct.

5 Q. Do you meet with Metis locals?

6 A. Specifically as trappers, or have I
7 met with...?

8 Q. Yes, or to put seminars on for
9 trapping and that type of thing?

10 A. I can't recall one specifically for
11 Metis trappers. I would estimate the times that there
12 have been meetings with trappers, there have been Metis
13 involved, and non-status people.

14 Q. All right. Could we flip over to
15 page 109, please. This is regarding fishing.

16 The sentence in the second paragraph, the
17 last sentence:

18 "In some northern native communities it
19 is again a source of income for which
20 there are few alternatives."

21 Would you agree with a statement that
22 interference with fishing rights would probably cause
23 more severe problems to native people than to
24 non-native people?

25 A. Not if I consider that most

1 commercial fishing was done on Lake Erie, that wouldn't
2 be true. On northern inland lakes, I am not sure.

3 Q. What about in the area of the
4 undertaking?

5 Then I think you indicated that these
6 people weren't included in the statistical evidence,
7 did you not, before?

8 A. They weren't commercial fishing in
9 terms of the Stats Canada data basically had the lines
10 across there for, instead of a number for hunting,
11 fishing and trapping I believe.

12 The information in my verbal evidence
13 that I gave accompanying this particular paragraph, I
14 did list some bands that I was aware of as
15 illustrations of northern native communities where it
16 is a source of income for which I believe there would
17 be few alternatives and to second-guess your next
18 question, in those cases, I believe them all to be
19 status Indians.

20 Q. Okay, thank you.

21 THE CHAIRMAN: Mr. really, would you pick
22 an appropriate place where we might adjourn for the
23 day? I know this area on fishing is fairly lengthy, so
24 it may be some time off before you are going to end
25 with this topic.

1 MR. REILLY: Well, Mr. Chairman maybe
2 this would be as good a place as any, if you wish.

3 THE CHAIRMAN: Okay.

4 Ladies and gentlemen, we are going to
5 adjourn for five minutes to allow the Board to collect
6 a present for each of you, which we will distribute at
7 this point and give you the night to contemplate its
8 contents.

9 We are intending to commence tomorrow
10 morning at 8:30 a.m. and we will start off with one
11 half hour, hopefully not much more than that, of
12 clarifying, if necessary, anything in the procedural
13 rules.

14 And then we will return to you, Mr.
15 Reilly, to complete your examination and if we have any
16 time left we will continue on with Mr. Castrilli.

17 We will probably be adjourning at the
18 usual time on the day we are returning south at around
19 two o'clock.

20 Thank you.

21 MR. REILLY: Thank you.

22 THE CHAIRMAN: We will be back in five
23 minutes.

24 ---Short recess

25 THE CHAIRMAN: Ladies and gentlemen, I do

1 not think we need anything further on the record
2 because all we are going to do at this time is pass
3 these out.
4 ---Whereupon the hearing adjourned at 6:15 p.m., to
5 reconvene on Friday, September 16th, 1988,
6 commencing at 8:30 a.m.

8 (Copyright, 1985)

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